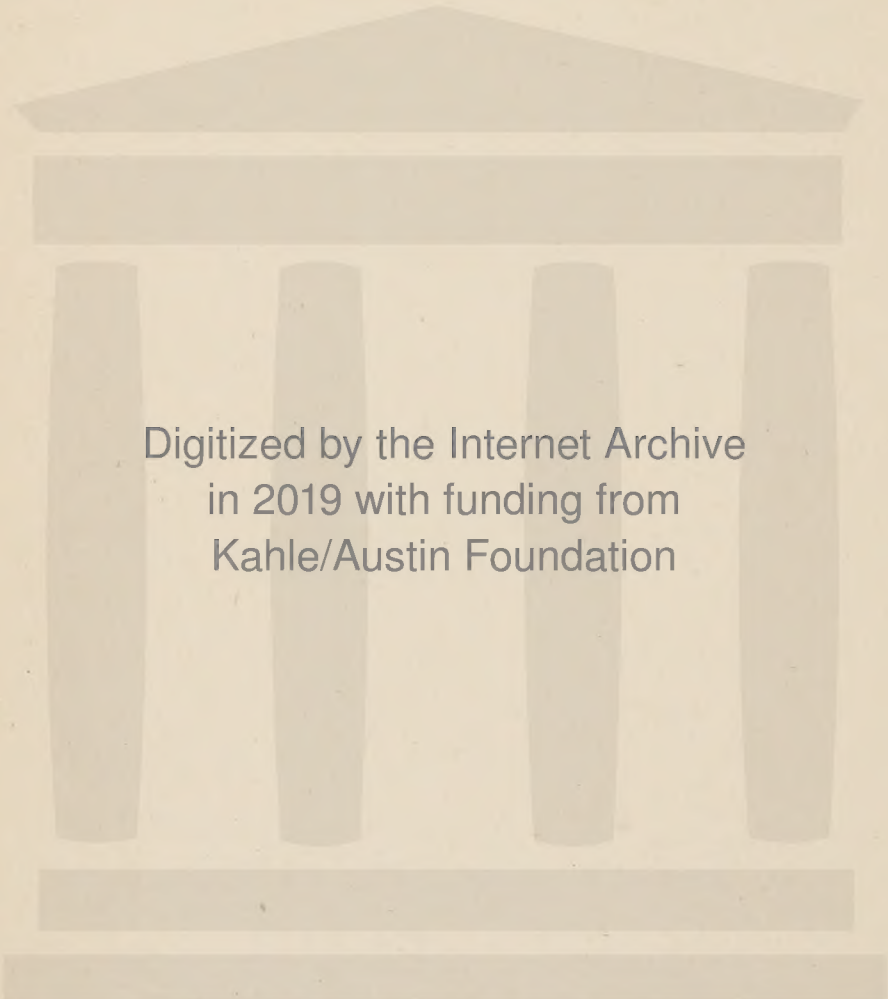
READINGS IN ROMAN LAW

W. L. Carr



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Edited with an Introduction, Notes, and Glossary

By

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PREFACE

THIS book is the outgrowth of several years of classroom experience. Each year there is at the University a considerable number of young men and women who are looking forward to the study of law, and who, having had two or three years of preparatory Latin, wish to continue the subject in college. For such students, the Institutes of Justinian affords supremely good reading material. While originally planned especially for pre-law students, experience has shown that the content of this work is so concrete, and of such universal interest, as to make it highly attractive to all classes of students, in high school as well as college.

The editor's design has been to present the most interesting portions of the Roman law, and those that have most to do with modern life, arranged in such a way as to make an easy gradation for the student with a limited command of Latin. Part I, designed for the first semester, is composed entirely of selections from the Institutes of Justinian, which is itself an elementary textbook for first year students. Part II, for the second semester, contains selections from the Institutes as the groundwork, supplemented by passages from the Digest, and a few from various other sources. This part of the book includes a complete presentation of the subject of contracts in Roman law.

The text of the selections from the Institutes and Digest is that of Krueger and Mommsen. For the paragraphing and punctuation the editor alone is responsible. The notes have purposely been made brief, and as a rule aim simply to help the student read the Latin text intelligently. Part II, being slightly more advanced, has been somewhat more fully annotated. Those teachers who find the amount of the subject matter in excess of their needs may omit pages 42-46 in Part I, and pages 47-51 and 59-65 in Part II without impairing the essential framework of the courses.

The editor has found the works named in the list at the

end of the book of great service, and it is published with the hope that they may be found equally helpful by other teachers and students of Roman law. When modern authors are cited in the notes, the references are to the titles and editions mentioned in this list. A brief glossary of Latin law terms and other words not usually found in the smaller dictionaries has been added.

My warmest thanks are due to my friend and former teacher, Professor J. H. Drake, of the Law Faculty of the University of Michigan, for much encouragement and assistance, and for his kindly and constructive criticism.

A. R. C.

Ann Arbor, Michigan,
March, 1928.

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INTRODUCTION

CERTAIN nations, like certain individuals, seem gifted by nature with singular ability in particular fields. The ancient Romans, like the Anglo-Saxons, have been credited with a peculiar genius in the great fields of law and administration. Sir Henry Maine has spoken of Roman law as "the chief branch of Latin literature." It is certainly the literature which deals with the most original and the most enduring contribution to civilization made by one of the greatest peoples in history. Its finished form, as presented to us in the Corpus Juris Civilis, is the work of a large number of the best minds in the ancient world, revising and perfecting the material through many successive generations. It is of unique interest again because it presents the complete picture of the legal development of the nation through more than a thousand years—a more finished and logical account than can be given of the law of any other time or country.

In order to determine the place and value of Roman law in modern education, it is necessary to inquire into the relation of Roman law to English and American law. While the great body of English law is for the larger part of native or Teutonic origin, it is equally true that in certain branches of English law and at certain periods the moulding and shaping influence of Roman legal science has been an important factor. In the middle of the twelfth century the Italian Vacarius, fresh from the great school of Roman law at Bologna, became professor of Roman law at Oxford. Ever since then the study has been a favorite one at that great university. In our own day, James Bryce, one of the keenest and most learned students of American constitutional law, was Regius Professor of Roman Law at Oxford.

Of early scientific presentations of English law, the most important is the monumental work of Henry Bracton, Chief Justice of England in the reign of Henry III. The plan of the work and a considerable part, though not the

larger part, of the contents are either derived from or strongly influenced by the Corpus Juris. Sometimes Bracton quotes directly from the Institutes or the Digest, and sometimes from the summary of the Italian Azo, of Bologna. Blackstone's Commentaries, the chief introductory textbook for students of English law in the last century, adopted a form and terminology largely derived from Roman models.

The question of the validity of the civil law in England has been a subject of discussion among lawyers both before and since Blackstone's day. The prevailing opinion has been well stated by an English jurist.* "The Roman law forms no rule binding in itself upon the subjects of these realms; but in deciding a case upon principle, where no direct authority can be cited from our books, it affords no small evidence of the soundness of the conclusion to which we have come, if it prove to be supported by that law, the fruit of the researches of the most learned men, the collective wisdom of ages, and the groundwork of the municipal law of most of the countries in Europe." In American courts Roman law has often been employed in accordance with the same principle.

Even a brief historical survey, therefore, makes it apparent that English law in its formative period, and in fact throughout its history, has been considerably influenced by the form and content of Roman law. It seems equally true that the type of legal writer who aspires to make his work systematic in outline or scientific in method is apt to be strongly influenced by the Roman jurists.

It is interesting also to observe which branches of English law are most indebted to Roman law. The striking analogy between the English Court of Chancery and the development of the praetor's jurisdiction at Rome has often been remarked. This does not prove a derivative relationship, but there seems little reason to doubt that the Chancery Court was in fact strongly affected by Roman law principles. Most of the early chancellors were ecclesiastics,

* C. J. Tindall, in Acton *vs* Blundell, 12 M. and W. 324, 353.

skilled in the canon and civil laws. In the handling of trusts, mortgages, legacies, and the law of partnership Roman influence is also traceable. The testamentary jurisdiction of English courts, at first lodged in ecclesiastical tribunals, was probably derived from and modelled after Roman sources.

The Admiralty Court was based primarily on the civil law. Its procedure was determined by a body of rules which originated in the countries bordering on the Mediterranean Sea, from the exigencies of international traffic. There were several such commercial codes in mediaeval times, of which two of the most important were the *Consolato del Mare*, employed in Spain, and the Laws of Oleron, embodying the usages of the Atlantic coast of France. The Laws of Oleron were adopted in England in the time of Richard I.

Stated in general terms, the influence of Roman sources on English law is most clearly apparent in those courts and those branches of law which arose either from a liberalizing and humanizing tendency, like the equitable jurisdiction, or from the body of customary rules developed by commercial intercourse, as in the case of the Admiralty Court and the Law Merchant.

For American students the study of Roman law possesses added value because of the similar social and political structure of the two countries. In the time of its greatest national development, Rome, like the United States, had a republican form of government. Both countries are distinguished by the relative prominence in their system of government of magistrates elected by the people; in both there is free intercourse between different parts of the national domain; in both the equality of citizens before the law is a cardinal point in the political creed; and the citizens of both are characterized in a high degree by an instinctive legal-mindedness—a feeling that changes affecting the rights and happiness of individuals or of society at large must proceed by legal and constitutional means.

In those parts of the United States and its insular posses-

sions which are or were formerly governed by French or Spanish law it is at once evident that Roman law is of peculiar interest and value. Both French law and Spanish law are modernized forms of Roman law. This relation is particularly conspicuous in Louisiana, whose admirable civil code of 1825, largely the work of Edward Livingston, was closely modeled on the famous Code Napoleon, which in turn is the best known modern adaptation of the law of Rome. Edward Livingston was one of the most brilliant legal minds this country has ever produced, and was an ardent student of the civil law.

Most of the continental countries of Europe are governed wholly or in part by modernized forms of Roman law. The most conspicuous example has been of course the great French civil code, the Code Napoleon, promulgated in 1804, and revised in 1816, which replaced the conflicting laws of the provinces of France by uniform and enlightened legal standards, and which is at once the most creditable and the most enduring monument to France's first citizen. The Dutch civil code of 1838, the Italian code of 1866, and the excellent Spanish code of 1889 were all designed on the general lines of the Code Napoleon. Soon after the founding of the German Empire in 1870, a commission was appointed to prepare a civil code for the whole country. Its preliminary draft in 1888 was soon followed by the appointment of a second commission to revise the first report, and the result of their labors, the new Civil Code for all Germany, went into effect in 1900. This is a very remarkable combination of Roman law, independently modernized and adapted to present day conditions, with native Teutonic law. It is in a high degree logical and scientific, is permeated by a thoroughly philosophical spirit, and is designed to be sufficiently elastic to meet new conditions as they arise. The Roman law element is relatively larger than it is in English law. The German Civil Code, coming nearly one hundred years later than the Code Napoleon, is the most thorough modernization of Roman law that has yet ap-

peared, and will doubtless have a large influence on the preparation of later systems of law in other countries.

Late in the sixteenth century, the Italian Gentili, Roman law lecturer at Oxford during the reign of Queen Elizabeth, and the Dutch Grotius, of French ancestry, early in the seventeenth century, won the ear of the civilized world for their claims for a law valid between nations. The epochal work of Grotius, *De Iure Belli et Pacis*, views the obligations of nations to one another in exactly the same way as the obligations arising from a Roman contract. The German jurist Pufendorf, also in the seventeenth century, who sought an ethical basis for international law, and found it in the Greco-Roman doctrine of Natural Law, was, like Gentili and Grotius, a profound student of the civil law.

In general it may be said that the chief mission of Roman law in the modern world seems to be to systematize, harmonize, liberalize, and humanize the systems of law existing in the various nations. With the great increase in intercourse between nations so characteristic of recent times and the consequent development of a spirit of cooperation, there is appearing a demand for a common body of working rules for civil intercourse which will in time acquire the force of law. With many of the nations so cooperating already governed, in part at least, by modernized forms of Roman law, it is not hard to realize that the subject must assume an even greater importance in the future.

Throughout his study of Roman jurisprudence, the student must feel his substantial respect for the Roman jurists steadily increasing, because of their intellectual candor, their directness, and their straightforward loyalty to the idea that the essence of the law is the scientific search for justice in the relations of man to man. Its consistently high ethical content makes the study of Roman law indispensable in the intellectual and spiritual training of the future lawyer.

While in primitive Rome, as in other countries, legal and religious conceptions are intimately associated, the growth

of Roman law is distinguished by an early separation of legal ideas and processes from religious ritual. As will appear later, this separation was not complete, but is sufficient to enable the student clearly to distinguish the two fields. Generally speaking, and especially in its earlier stages, the Roman law, like the national genius, is preeminently practical, not theoretical or philosophical. One rather striking exception to this is found in the appearance of the doctrine of Natural Law, which, in part at least, is an effect of the teachings of the Stoic philosophy. At first too, and to a considerable extent throughout the republican period, Roman law seems strongly national, and not cosmopolitan in spirit.

The early laws and legal processes of Rome were highly formal, rigid, and ceremonial. This is doubtless due to their early association with ceremonial ritual and religious rites. The story of their development is largely the story of the relaxing of this formality and their growth in elasticity and humanity. In origin they seem based for the most part on custom. The first great landmark in the appearance of written law is the Law of the Twelve Tables, published in 450 B. C., as the result of the labors of the Decemviri, a commission of ten appointed the previous year to formulate and publish the fundamental laws of the young republic. There is a tradition that a deputation had been sent to Greece to study the laws of the Greeks, but if so, the extant fragments of the Twelve Tables show little or no effect of such a mission. The fragments deal with private rather than with public law, are brief, definite, and concrete in application, and refer only to distinctly Roman matters. Probably this legislation does not represent the earliest law of Rome, but was a crystallization or summary of unwritten rules based on long practice. It was enacted by the assembly of the people, following recommendation by the Decemvirs.

Early legal processes were few in number, fitting only a few typical cases, rigid and formal in character, consisting of symbolic acts amounting in some cases almost to dra-

matic representation. These were called *legis actiones.* In early times the college of Pontiffs was in charge of the enforcement of the Twelve Tables and of the application of the *legis actiones,* but their monopoly was later broken, and gradually knowledge of the law and of legal processes became generally diffused among the citizens. This earlier law, peculiar to the city of Rome, is known as *ius civile,* or civil law; but this meaning should not be confused with the very common use of the term civil law to refer to Roman law as a whole. Similarly, students of Roman law are sometimes called civilians. In contrast with the *ius civile,* or civil law in the first sense, that part of Roman law which is based on the common practice of all states was called *ius gentium.*

The body of Roman law grew and developed chiefly in four ways: by legislative enactment, by its equitable enforcement by magistrates, by the commentaries of legal teachers or lecturers, and by interpretation. It is worthy of notice that the part played by direct legislation is relatively somewhat less than in our time and country, and the part played by the second factor relatively larger. Legislation was not confined to one branch of the government, but several varieties of enactment are mentioned. Laws passed by the people in their assemblies were called *leges*; resolutions of the plebeian assembly, which presently acquired the force of law, were known as *plebiscita*; decrees of the senate were termed *senatus consulta*; and proclamations of magistrates, *edicta magistratuum,* formed a fourth kind. After Rome became an empire, enactments of the emperor, though appearing in several different forms, were collectively called *principum placita,* and in both periods, but especially under the Empire, much importance was attached to formal opinions of jurists, which were known as *responsa prudentium.* In these *responsa* is found the most typical form of interpretation. The supervision of the law formerly exercised by the Pontiffs was later divided between the magistrates and the jurists. Early in the imperial period, the

assemblies of the people gradually ceased to pass laws, and in the third century A. D. *senatus consulta* were discontinued, after which the emperor was practically the sole source of new legislation.

Some of these divisions are not as sharply differentiated as might appear from this outline; they are rather phases of development. For instance, the senate was originally an advisory body, and during the republican period, though it often issued decrees as instructions to magistrates, it was not in theory a legislative body. Under the empire the senate passed laws, but usually on the initiative of the emperor. Similarly, magistrates were in theory not supposed to make laws, but the praetor, by his power to supervise the preliminary proceedings in a trial, and especially by his edict announcing the principles by which he proposed to be guided in granting or refusing actions in different types of cases, came to be an extremely effective factor in the shaping of the law. It should be clearly understood that the Romans did not first devise an organized body of law, and then put it into operation, but that their law, like their political constitution, was evolved in action, under the pressure of circumstances, and guided at every point by experience.

A Roman trial, after judicial processes became well established, had two phases: a preliminary one, under the supervision of the praetor, in which the question was stated and the form of trial determined, the proceeding *in iure*; and the decision of the point at issue, the proceeding *in iudicio*, which was referred to one or more private persons, called *iudices*. Under the jurisdiction of the praetor, the rigid system of *legis actiones* was replaced by the much more elastic *formula*, or statement of the case by the praetor. In the course of their equitable administration of the law, successive praetors, by refusing actions where the old law had allowed them, by extending older actions to analogous cases, and sometimes by giving entirely new actions to fit new sets of facts, gradually made great changes in the law. This is one

of the most important ways in which Roman law grew and developed. In general, the direction of the changes was toward more humane and liberal forms and methods, a progressive adaptation of the law to the reasonable needs of the people, and ultimately toward a broader and more cosmopolitan spirit.

It was customary for a praetor, at the beginning of his year of office, to issue an edict stating the most important rules by which he would be guided in the administration of justice. He usually incorporated many or most of the features of the edict of his predecessor and added some contributions of his own. The praetor's edict thus became one of the most important forms of law. The Romans called offices *honores*, and the law made by officials was therefore called the honorary law, *ius honorarium*, in distinction from the older civil law, *ius civile*. The process just described went on for many generations, until finally the emperor Hadrian, in the second century A. D., directed Salvius Julianus, an eminent jurist, to put the edict into permanent form, *edictum perpetuum*.

In Rome, as in our own country, those charged with instruction in the law had considerable influence on its development. Among these may be mentioned Scaevola the Augur and Scaevola the Pontifex, men of very remarkable breadth and grasp of mind, and both of them teachers of Cicero. A still greater influence was exercised by a law lecturer of the second century A. D. who is known to us only by his forename of Gaius. Gaius was the author of a number of law books, of which the best known is his Institutes, in which many of the elementary principles of Roman law find singularly clear presentation. This work was lost for centuries, until its very interesting discovery by Niebuhr, in 1816, at Verona. The Institutes of Gaius is still considered among the most valuable of legal texts.

The opinions of men learned in the law on difficult and puzzling legal questions propounded to them were received with much respect under the Republic, and the services of the more eminent ones were in great demand by those en-

gaged in litigation. Historically, this was a function derived from the Pontiffs. Jurists received no fees, but their assistance was often recognized by marks of public esteem, and sometimes by elevation to high position in civil life. Their formal opinions were called *responsa prudentium*. At a later period the emperors formally conferred upon certain jurists the right *ius respondendi*, and their opinions when duly rendered in some cases acquired the force of law. In time a very considerable amount of such material accumulated, and exercised much influence on the development of law and on its administration.

In the long course of Roman legal history, many men of distinguished ability participated in the interpretation and development of Roman law. In the time of Augustus, two were especially famous, Labeo and Capito. The rivalry between them seems to have been the source out of which grew two schools of legal theory, called the Proculian from Proculus, a later follower of Labeo, and the Sabinian from Sabinus, a pupil of Capito. The exact distinction between the teachings of the two schools is rather hard to define; perhaps the best view is that the Sabinians were inclined toward a more exact adherence to the letter of the law, while the Proculians believed that the law should be interpreted in such a way as to carry out its spirit and the intent of the makers—a line of cleavage analogous to the division between "strict construction" and "loose construction" of constitutional law in American history. Labeo was a writer and thinker of remarkable genius, but as time went on the Sabinian school attracted the larger following among the jurists.

Javolenus in the time of Trajan, and Salvius Julianus, who codified the edict in the time of Hadrian, were probably the most distinguished lawyers of their age, but the greatest prestige of all was accorded to Papinian, who was in office under Marcus Aurelius and was Praetorian Prefect under Septimus Severus. He is believed to have been with Severus in England when the emperor died there in 211 A. D. Of a long line of jurists before and after Papinian, the names of

Paul, Ulpian, and Modestinus are particularly noteworthy. Their opinions are very frequently cited in the Digest, especially those of Ulpian. Ulpian more than perhaps any other jurist is inclined toward a broad and philosophical treatment of legal questions. The period from Julianus to Ulpian, who met his death at the hands of Caracalla, is sometimes called the classical age of Roman law. Both Paul and Ulpian were pupils of Papinian. The "Law of Citations," 426 A. D., provided that the writings of Gaius, Papinian, Paul, Ulpian, and Modestinus might be cited in court as authoritative texts; if they agreed, their opinion should be binding on the judex; if they were equally divided, the opinion of Papinian should prevail. Modestinus, a younger contemporary of Ulpian, was the last of the great jurists.

The last great movement in the history of ancient Roman law was one toward scientific codification. The combined bulk of legal writings was now so great as to be unmanageable; some of the material was obsolete, and some contradictory, and the part that was still valid law greatly needed systematic arrangement. Several partial codifications preceded the final one by Justinian. A private compilation of the imperial enactments from Hadrian down to the date of its publication appeared not far from the year 300 A. D. This is known as the Gregorian Code. It was followed a few years later by a somewhat similar publication, called the Hermogenian Code. In 438 A. D. an official collection of imperial legislation from Constantine to its own date of publication—practically a continuation of the Gregorian Code—was issued by the emperor Theodosius the Great, and has been known as the Theodosian Code. It has come down to us in somewhat fragmentary condition, parts of it being preserved in various manuscripts. Another important collection was the Code of Alaric II, *Lex Romana Visigothorum*, or *Breviarium Alarici*, published in France in 506 A. D. This has preserved portions of the writings of Gaius and Paul, and a large part of the Theodosian Code.

Justinian, emperor of the Eastern Roman Empire 527-565

A.D., is famous for the brilliant exploits of his generals in war, but much more for having planned and ordered the great codification of the whole body of Roman law known as the Corpus Juris Civilis, or simply as the Corpus Juris. The first part of the work to appear was a new edition of the constitutions, or enactments of the emperors, revised and brought up to date. This is now known as the Code, and was published in 529 A. D. The next year the emperor commissioned Tribonian, his praetorian prefect, and an extremely able man, to choose his own colleagues and proceed with the formation of a condensed and systematized compilation of the opinions of the jurists. This was the most formidable task of the whole work, but the commission of sixteen men worked so expeditiously that three years later, in 533 A. D., the result of their efforts appeared in the Digest or Pandects, much the largest work in the Corpus Juris. The next year a second edition of the Code appeared, which superseded the former one.

Not content with these great achievements, and without waiting for the completion of the Digest, the emperor had commissioned Tribonian, in collaboration with Theophilus and Dorotheus, famous professors in the law schools at Constantinople and Berytus (Beirut) respectively, to compile a new elementary textbook covering the whole field of Roman law. This work, called the Institutes of Justinian, is a revised, corrected, and enlarged edition of the Institutes of Gaius, but containing much original matter. It appeared in the same year as the Digest, 533 A. D., and the emperor ordered that the Code, Digest, and Institutes should henceforth be the authorized body of Roman law, superseding all earlier versions. The Institutes of Justinian presents, in remarkably clear and simple Latin, the essentials of Roman law as worked over, corrected and revised by many generations of conspicuously able legal minds. It was the text used by first year students in the Roman law schools. Much of the material in the following pages is from the Institutes, supplemented in Part II by selections from the Digest, and a few from other sources.

PART ONE

DE IUSTITIA ET IURE

Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iuris prudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.

His generaliter cognitis et incipientibus nobis exponere iura populi Romani ita maxime videntur posse tradi commodissime, si primo levi ac simplici, post deinde diligentissima atque exactissima interpretatione singula tradantur. Alioquin si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneraverimus, duorum alterum aut desertorem studiorum efficiemus aut cum magno labore eius, saepe etiam cum diffidentia, quae plerumque iuvenes avertit, serius ad id perducamus, ad quod leniore via ductus sine magno labore et sine ulla diffidentia maturius perduci potuisset.

Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere. Huius studii duae sunt positiones, publicum et privatum. Publicum ius est, quod ad statum rei Romanae spectat, privatum, quod ad singulorum utilitatem pertinet. Dicendum est igitur de iure privato, quod est tripertitum; collectum est enim ex naturalibus praeceptis aut gentium aut civilibus.

Inst. Book I, Title 1.

DE IURE NATURALI ET GENTIUM ET CIVILI

Ius naturale est, quod natura omnia animalia docuit. Nam ius istud non humani generis proprium est, sed omnium animalium, quae in caelo, quae in terra, quae in mari nascuntur. Hinc descendit maris atque feminae coniugatio, quam nos matrimonium appellamus, hinc liberorum procreatio et educatio; videmus etenim cetera quoque animalia istius iuris peritia censeri.

Ius autem civile vel gentium ita dividitur: omnes populi, qui legibus et moribus reguntur, partim suo proprio, partim

communi omnium hominum iure utuntur; nam quod quisque populus ipse sibi ius constituit, id ipsius proprium civitatis est vocaturque ius civile, quasi ius proprium ipsius civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque ius gentium, quasi quo iure omnes gentes utuntur. Et populus itaque Romanus partim suo proprio, partim communi omnium hominum iure utitur. Quae singula qualia sunt, suis locis proponemus. Sed ius quidem civile ex unaquaque civitate appellatur, veluti Atheniensium; nam si quis velit Solonis vel Draconis leges appellare ius civile Atheniensium, non erraverit. Sic enim et ius, quo populus Romanus utitur, ius civile Romanorum appellamus; vel ius Quiritium, quo Quirites utuntur; Romani enim a Quirino Quirites appellantur. Sed quotiens non addimus, cuius sit civitatis, nostrum ius significamus; sicuti cum poetam dicimus nec addimus nomen, subauditur apud Graecos egregius Homerus, apud nos Vergilius. Ius autem gentium omni humano generi commune est. Nam usu exigente et humanis necessitatibus gentes humanae quaedam sibi constituerunt; bella etenim orta sunt et captivitates secutae et servitutes, quae sunt iuri naturali contrariae; iure enim naturali ab initio omnes homines liberi nascebantur. Ex hoc iure gentium et omnes paene contractus introducti sunt, ut emptio venditio, locatio conductio, societas, depositum, mutuum et alii innumerabiles.

Constat autem ius nostrum aut ex scripto aut ex non scripto, ut apud Graecos τῶν νόμων οἱ μὲν ἔγγραφοι, οἱ δὲ ἄγραφοι. Scriptum ius est lex, plebi scita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium.

Lex est, quod populus Romanus senatore magistratu interrogante, veluti consule, constituebat. Plebi scitum est, quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat. Plebs autem a populo eo differt, quo species a genere; nam appellatione populi universi cives significantur connumeratis etiam patriciis et senatoribus; plebis au-

tem appellatione sine patriciis et senatoribus ceteri cives significantur. Sed et plebi scita lege Hortensia lata non minus valere quam leges coeperunt.

Senatus consultum est, quod senatus iubet atque constituit. Nam cum auctus est populus Romanus in eum modum, ut difficile sit in unum eum convocare legis sanciendae causa, aequum visum est senatum vice populi consuli. Sed et quod principi placuit, legis habet vigorem, cum lege regia, quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem concessit. Quodcumque igitur imperator per epistulam constituit vel cognoscens decrevit vel edicto praecepit, legem esse constat; haec sunt, quae constitutiones appellantur. Plane ex his quaedam sunt personales, quae nec ad exemplum trahuntur, quoniam non hoc princeps vult; nam quod alicui ob merita indulsit, vel si cui poenam irrogavit, vel si cui sine exemplo subvenit, personam non egreditur. Aliae autem, cum generales sunt, omnes procul dubio tenent.

Praetorum quoque edicta non modicam iuris optinent auctoritatem. Haec etiam ius honorarium solemus appellare, quod qui honores gerunt, id est magistratus, auctoritatem huic iuri dederunt. Proponebant et aediles curules edictum de quibusdam casibus, quod edictum iuris honorarii portio est.

Responsa prudentium sunt sententiae et opiniones eorum, quibus permissum erat iura condere. Nam antiquitus institutum erat, ut essent qui iura publice interpretarentur, quibus a Caesare ius respondendi datum est, qui iuris consulti appellabantur; quorum omnium sententiae et opiniones eam auctoritatem tenent, ut iudici recedere a responso eorum non liceat, ut est constitutum.

Ex non scripto ius venit, quod usus comprobavit; nam diuturni mores consensu utentium comprobati legem imitantur. Et non ineleganter in duas species ius civile distributum videtur; nam origo eius ab institutis duarum civitatium, Athenarum scilicet et Lacedaemonis, fluxisse videtur; in his enim civitatibus ita agi solitum erat, ut Lacedae-

monii quidem magis ea, quae pro legibus observarent, memoriae mandarent, Athensienses vero ea, quae in legibus scripta reprehendissent, custodirent.

Sed naturalia quidem iura, quae apud omnes gentes peraeque servantur, divina quadam providentia constituta semper firma atque immutabilia permanent; ea vero, quae ipsa sibi quaeque civitas constituit, saepe mutari solent vel tacito consensu populi vel alia postea lege lata.

Omne autem ius, quo utimur, vel ad personas pertinet vel ad res vel ad actiones. Ac prius de personis videamus; nam parum est ius nosse, si personae, quarum causa statutum est, ignorentur.

Inst. I, 2.

DE IURE PERSONARUM

Summa itaque divisio de iure personarum haec est quod omnes homines aut liberi sunt aut servi. Et libertas quidem est, ex qua etiam liberi vocantur, naturalis facultas eius quod cuique facere libet, nisi si quid aut vi aut iure prohibetur. Servitus autem est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur. Servi autem ex eo appellati sunt, quod imperatores captivos vendere iubent ac per hoc servare nec occidere solent; qui etiam mancipia dicti sunt, quod ab hostibus manu capiuntur. Servi autem aut nascuntur aut fiunt. Nascuntur ex ancillis nostris; fiunt aut iure gentium, id est ex captivitate, aut iure civili, cum homo liber maior viginti annis ad pretium participandum sese venumdari passus est. In servorum condicione nulla differentia est. In liberis multae differentiae sunt; aut enim ingenui sunt aut libertini.

Inst. I, 3.

DE RERUM DIVISIONE

Superiore libro de iure personarum exposuimus; modo videamus de rebus. Quae vel in nostro patrimonio vel extra nostrum patrimonium habentur. Quaedam enim naturali iure communia sunt omnium, quaedam publica, quaedam universitatis, quaedam nullius, pleraque singulorum, quae variis ex causis cuique adquiruntur, sicut ex subiectis apparebit.

Et quidem naturali iure communia sunt omnium haec: aer et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur, dum tamen villis et monumentis et aedificiis abstineat, quia non sunt iuris gentium, sicut et mare.

Flumina autem omnia et portus publica sunt; ideoque ius piscandi omnibus commune est in portubus fluminibusque. Est autem litus maris, quatenus hibernus fluctus maximus excurrit. Riparum quoque usus publicus est iuris gentium, sicut ipsius fluminis; itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare. Sed proprietas earum illorum est, quorum praediis haerent; qua de causa arbores quoque in isdem natae eorundem sunt. Litorum quoque usus publicus iuris gentium est, sicut ipsius maris; et ob id quibuslibet liberum est casam ibi imponere, in qua se recipiant, sicut retia siccare et ex mare deducere. Proprietas autem eorum potest intellegi nullius esse, sed eiusdem iuris esse, cuius et mare et quae subiacent mari, terra vel harena.

Universitatis sunt, non singulorum veluti quae in civitatibus sunt, ut theatra, stadia, et similia, et si qua alia sunt communia civitatium.

Nullius autem sunt res sacrae et religiosae et sanctae; quod enim divini iuris est, id nullius in bonis est. Sacra sunt, quae rite et per pontifices deo consecrata sunt, veluti aedes sacrae et dona, quae rite ad ministerium dei dedicata sunt, quae etiam per nostram constitutionem alienari et obli-

gari prohibuimus, excepta causa redemptionis captivorum. Si quis vero auctoritate sua quasi sacrum sibi constituerit, sacrum non est, sed profanum. Locus autem, in quo sacrae aedes aedificatae sunt, etiam diruto aedificio adhuc sacer manet, ut et Papinianus scripsit.

Religiosum locum unusquisque sua voluntate facit, dum mortuum infert in locum suum. In communem autem locum purum invito socio inferre non licet; in commune vero sepulchrum etiam invitis ceteris licet inferre. Item si alienus usus fructus est, proprietarium placet nisi consentiente usufructuario locum religiosum non facere. In alienum locum concedente domino licet inferre; et licet postea ratum habuerit, quam illatus est mortuus, tamen religiosus locus fit.

Sanctae quoque res, veluti muri et portae, quodammodo divini iuris sunt et ideo nullius in bonis sunt. Ideo autem muros sanctos dicimus, quia poena capitis constituta sit in eos, qui aliquid in muros deliquerint. Ideo et legum eas partes, quibus poenas constituimus adversus eos qui contra leges fecerint, sanctiones vocamus.

Singulorum autem hominum multis modis res fiunt: quarundam enim rerum dominium nanciscimur iure naturali, quod, sicut diximus, appellatur ius gentium, quarundam iure civili. Commodius est itaque a vetustiore iure incipere. Palam est autem vetustius esse naturale ius, quod cum ipso genere humano rerum natura prodidit; civilia enim iura tunc coeperunt esse, cum et civitates condi et magistratus creari et leges scribi coeperunt.

Ferae igitur bestiae et volucres et pisces, id est omnia animalia, quae in terra, mari, caelo nascuntur, simulatque ab aliquo capta fuerint, iure gentium statim illius esse incipiunt; quod enim ante nullius est, id naturali ratione occupanti conceditur. Nec interest, feras bestias et volucres utrum in suo fundo quisque capiat, an in alieno; plane qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi ne ingrediatur.

Quidquid autem eorum ceperis, eo usque tuum esse intellegitur, donec tua custodia coercetur; cum vero evaserit custodiam tuam et in naturalem libertatem se receperit, tuum esse desinit et rursus occupantis fit. Naturalem autem libertatem recipere intellegitur, cum vel oculos tuos effugerit vel ita sit in conspectu tuo, ut difficilis sit eius persecutio.

Illud quaesitum est, an, si fera bestia ita vulnerata sit, ut capi possit, statim tua esse intellegatur. Quibusdam placuit statim tuam esse et eo usque tuam videri, donec eam persequaris, quodsi desieris persequi, desinere tuam esse et rursus fieri occupantis. Alii non aliter putaverunt tuam esse, quam si ceperis. Sed posteriorem sententiam nos confirmamus, quia multa accidere solent, ut eam non capias.

Apium quoque natura fera est. Itaque quae in arbore tua consederint, antequam a te alveo includantur, non magis tuae esse intelleguntur, quam volucres, quae in tua arbore nidum fecerint; ideoque si alius eas incluserit, is earum dominus erit. Favos quoque si quos hae fecerint, quilibet eximere potest. Plane integra re si provideris ingredientem in fundum tuum, potes eum iure prohibere ne ingrediatur. Examen, quod ex alveo tuo evolaverit, eo usque tuum esse intellegitur, donec in conspectu tuo est nec difficilis eius persecutio est; alioquin occupantis fit.

Pavonum et columbarum fera natura est. Nec ad rem pertinet, quod ex consuetudine avolare et revolare solent; nam et apes idem faciunt, quarum constat feram esse naturam; cervos quoque ita quidam mansuetos habent, ut in silvas ire et redire soleant, quorum et ipsorum feram esse naturam nemo negat. In his autem animalibus, quae ex consuetudine abire et redire solent, talis regula comprobata est, ut eo usque tua esse intellegantur, donec animum revertendi habeant; nam si revertendi animum habere desierint, etiam tua esse desinunt et fiunt occupantium. Revertendi autem animum videntur desinere habere, cum revertendi consuetudinem deseruerint.

Gallinarum et anserum non est fera natura idque ex eo

possumus intellegere, quod aliae sunt gallinae, quas feras vocamus, item alii anseres, quos feros appellamus. Ideoque si anseres tui aut gallinae tuae aliquo casu turbati turbataeve evolaverint, licet conspectum tuum effugerint, quocumque tamen loco sint, tui tuaeve esse intelleguntur; et qui lucrandi animo ea animalia retinet, furtum committere intellegitur.

Item ea, quae ex hostibus capimus, iure gentium statim nostra fiunt; adeo quidem, ut et liberi homines in servitutem nostram deducantur, qui tamen, si evaserint nostram potestatem et ad suos reversi fuerint, pristinum statum recipiunt. Item lapilli gemmae et cetera, quae in litore inveniuntur, iure naturali statim inventoris fiunt. Item ea, quae ex animalibus dominio tuo subiectis nata sunt, eodem iure tibi adquiruntur.

Praeterea quod per alluvionem agro tuo flumen adiecit, iure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur adici, quod ita paulatim adicitur, ut intellegere non possis, quantum quoquo momento temporis adiciatur. Quodsi vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere. Plane si longiore tempore fundo vicini haeserit arboresque quas secum traxerit, in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitae esse.

Insula quae in mari nata est, quod raro accidit, occupantis fit; nullius enim esse creditur. At in flumine nata, quod frequenter accidit, si quidem mediam partem fluminis teneat, communis est eorum, qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cuiusque fundi, quae latitudo prope ripam sit. Quodsi alteri parti proximior sit, eorum est tantum, qui ab ea parte prope ripam praedia possident. Quodsi aliqua parte divisum flumen, deinde infra unitum agrum alicuius in formam insulae redegerit, eiusdem permanet is ager, cuius et fuerat.

Quodsi naturali alveo in universum derelicto alia parte fluere coeperit, prior quidem alveus eorum est, qui prope

ripam eius praedia possident, pro modo scilicet latitudinis cuiusque agri, quae latitudo prope ripam sit, novus autem alveus eius iuris esse incipit, cuius et ipsum flumen, id est publicus. Quodsi post aliquod tempus ad priorem alveum reversum fuerit flumen, rursus novus alveus eorum esse incipit, qui prope ripam eius praedia possident. Alia sane causa est, si cuius totus ager inundatus fuerit; neque enim inundatio speciem fundi commutat et ob id, si recesserit aqua, palam est eum fundum eius manere, cuius et fuit.

Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utrum is qui fecerit, an ille potius qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit, aut ex alieno auro vel argento vel aere vas aliquod fecerit, vel ex alieno vino et melle mulsum miscuerit, vel ex alienis medicamentis emplastrum aut collyrium composuerit, vel ex aliena lana vestimentum fecerit, vel ex alienis tabulis navem vel armarium vel subsellium fabricaverit. Et post multas Sabinianorum et Proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse, qui materiae dominus fuerat, si non possit reduci, eum potius intellegi dominum qui fecerit: ut ecce vas conflatum potest ad rudem massam aeris vel argenti vel auri reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest ac ne mulsum quidem ad vinum et mel resolvi potest. Quodsi partim ex sua materia, partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum aut ex suis et alienis medicamentis emplastrum aut collyrium aut ex sua et aliena lana vestimentum fecerit, dubitandum non est hoc casu eum esse dominum qui fecerit; cum non solum operam suam dedit, sed et partem eiusdem materiae praestavit.

Si tamen alienam purpuram quis intexuit suo vestimento, licet pretiosior est purpura, accessionis vice cedit vestimen-

to; et qui dominus fuit purpurae, adversus eum qui subripuit habet furti actionem et condictionem, sive ipse est qui vestimentum fecit, sive alius. Nam extinctae res licet vindicari non possint, condici tamen a furibus et a quibusdam aliis possessoribus possunt.

Si duorum materiae ex voluntate dominorum confusae sint, totum id corpus, quod ex confusione fit, utriusque commune est, veluti si qui vina sua confuderint aut massas argenti vel auri conflaverint. Sed si diversae materiae sint et ob id propria species facta sit, forte ex vino et melle mulsum aut ex auro et argento electrum, idem iuris est; nam et eo casu communem esse speciem non dubitatur. Quodsi fortuitu et non voluntate dominorum confusae fuerint vel diversae materiae vel quae eiusdem generis sunt, idem iuris esse placuit.

Quodsi frumentum Titii tuo frumento mixtum fuerit, si quidem ex voluntate vestra, commune erit, quia singula corpora, id est singula grana, quae cuiusque propria fuerunt, ex consensu vestro communicata sunt. Quodsi casu id mixtum fuerit vel Titius id miscuerit sine voluntate tua, non videtur commune esse, quia singula corpora in sua substantia durant nec magis istis casibus commune fit frumentum, quam grex communis esse intellegitur, si pecora Titii tuis pecoribus mixta fuerint; sed si ab alterutro vestrum id totum frumentum retineatur, in rem quidem actio pro modo frumenti cuiusque competat, arbitrio autem iudicis continetur, ut is aestimet, quale cuiusque frumentum fuerit.

Cum in suo solo aliquis aliena materia aedificaverit, ipse dominus intellegitur aedificii, quia omne quod inaedificatur solo cedit. Nec tamen ideo is, qui materiae dominus fuerat, desinit eius dominus esse; sed tantisper neque vindicare eam potest neque ad exhibendum de ea re agere propter legem duodecim tabularum, qua cavetur, ne quis tignum alienum aedibus suis iniunctum eximere cogatur, sed duplum pro eo praestet per actionem quae vocatur de tigno iuncto (appellatione autem tigni omnis materia sig-

nificatur, ex qua aedificia fiunt); quod ideo provisum est, ne aedificia rescindi necesse sit. Sed si aliqua ex causa dirutum sit aedificium, poterit materiae dominus, si non fuerit duplum iam persecutus, tunc eam vindicare et ad exhibendum agere.

Ex diverso si quis in alieno solo sua materia domum aedificaverit, illius fit domus, cuius et solum est. Sed hoc casu materiae dominus proprietatem eius amittit, quia voluntate eius alienata intellegitur, utique si non ignorabat in alieno solo se aedificare; et ideo, licet diruta sit domus, vindicare materiam non possit. Certe illud constat si in possessione constituto aedificatore soli dominus petat domum suam esse nec solvat pretium materiae et mercedes fabrorum, posse eum per exceptionem doli mali repelli, utique si bonae fidei possessor fuit qui aedificasset; nam scienti alienum esse solum potest culpa obici, quod temere aedificaverit in eo solo, quod intellegeret alienum esse.

Si Titius alienam plantam in suo solo posuerit, ipsius erit; et ex diverso si Titius suam plantam in Maevii solo posuerit, Maevii planta erit, si modo utroque casu radices egerit. Antequam autem radices egerit, eius permanet, cuius et fuerat. Adeo autem ex eo, ex quo radices agit planta, proprietas eius commutatur, ut, si vicini arborem ita terra Titii presserit, ut in eius fundum radices ageret, Titii effici arborem dicimus; rationem etenim non permittere, ut alterius arbor esse intellegatur, quam cuius in fundum radices egisset. Et ideo prope confinium arbor posita si etiam in vicini fundum radices egerit, communis fit.

Qua ratione autem plantae, quae terra coalescunt, solo cedunt, eadem ratione frumenta quoque, quae sata sunt, solo cedere intelleguntur. Ceterum sicut is qui in alieno solo aedificaverit, si ab eo dominus petat aedificium, defendi potest per exceptionem doli mali secundum ea quae diximus, ita eiusdem exceptionis auxilio tutus esse potest is, qui alienum fundum sua impensa bona fide consevit.

Litterae quoque, licet aureae sint, perinde chartis membranisque cedunt, acsi solo cedere solent ea quae inaedifi-

cantur aut inseruntur; ideoque si in chartis membranisve tuis carmen vel historiam vel orationem Titius scripserit, huius corporis non Titius, sed tu dominus esse iudiceris. Sed si a Titio petas tuos libros tuasve membranas esse nec impensam scripturae solvere paratus sis, poterit se Titius defendere per exceptionem doli mali, utique si bona fide earum chartarum membranarumve possessionem nanctus est.

Si quis in aliena tabula pinxerit, quidam putant tabulam picturae cedere; aliis videtur picturam, qualiscumque sit, tabulae cedere. Sed nobis videtur melius esse tabulam picturae cedere; ridiculum est enim picturam Apellis vel Parrhasii in accessionem vilissimae tabulae cedere. Unde si a domino tabulae imaginem possidente is qui pinxit eam petat nec solvat pretium tabulae, poterit per exceptionem doli mali summoveri; ac si is qui pinxit possideat, consequens est, ut utilis actio domino tabulae adversus eum detur, quo casu, si non solvat impensam picturae, poterit per exceptionem doli mali repelli, utique si bona fide possessor fuerit ille qui picturam imposuit. Illud enim palam est, quod, sive is qui pinxit subripuit tabulas sive alius, competit domino tabularum furti actio.

Si quis a non domino, quem dominum esse crederet, bona fide fundum emerit vel ex donatione aliave qua iusta causa aeque bona fide acceperit, naturali ratione placuit fructus quos percepit eius esse pro cultura et cura. Et ideo si postea dominus supervenerit et fundum vindicet, de fructibus ab eo consumptis agere non potest. Ei vero, qui sciens alienum fundum possederit, non idem concessum est; itaque cum fundo etiam fructus, licet consumpti sint, cogitur restituere.

Is, ad quem usus fructus fundi pertinet, non aliter fructuum dominus efficitur, quam si eos ipse perceperit. Et ideo licet maturis fructibus, nondum tamen perceptis decesserit, ad heredem eius non pertinent, sed domino proprietatis adquiruntur. Eadem fere et de colono dicuntur.

In pecudum fructu etiam fetus est, sicuti lac et pilus et lana; itaque agni et haedi et vituli et equuli statim naturali

iure dominii sunt fructuarii. Partus vero ancillae in fructu non est itaque ad dominum proprietatis pertinet; absurdum enim videbatur hominem in fructu esse, cum omnes fructus rerum natura hominum gratia comparavit. Sed si gregis usum fructum quis habeat, in locum demortuorum capitum ex fetu fructuarius summittere debet, ut et Iuliano visum est, et in vinearum demortuarum vel arborum locum alias debet substituere; recte enim colere debet et quasi bonus pater familias uti debet.

Thesauros, quos quis in suo loco invenerit, divus Hadrianus naturalem aequitatem secutus ei concessit qui invenerit. Idemque statuit, si quis in sacro aut in religioso loco fortuito casu invenerit. At si quis in alieno loco non data ad hoc opera, sed fortuitu invenerit, dimidium domino soli concessit. Et convenienter, si quis in Caesaris loco invenerit, dimidium inventoris, dimidium Caesaris esse statuit. Cui conveniens est, ut, si quis in publico loco vel fiscali invenerit, dimidium ipsius esse, dimidium fisci vel civitatis.

Per traditionem quoque iure naturali res nobis adquiruntur; nihil enim tam conveniens est naturali aequitati, quam voluntatem domini, volentis rem suam in alium transferre, ratam haberi; et ideo cuiuscumque generis sit corporalis res, tradi potest et a domino tradita alienatur. Itaque stipendiaria quoque et tributaria praedia eodem modo alienantur. Vocantur autem stipendiaria et tributaria praedia, quae in provinciis sunt, inter quae nec non Italica praedia ex nostra constitutione nulla differentia est.

Sed si quidem ex causa donationis aut dotis aut qualibet alia ex causa tradantur, sine dubio transferuntur; venditae vero et traditae non aliter emptori adquiruntur, quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore aut pignore dato. Quod cavetur quidem etiam lege duodecim tabularum; tamen recte dicitur et iure gentium, id est iure naturali, id effici. Sed si is qui vendidit fidem emptoris secutus fuerit, dicendum est statim rem emptoris fieri.

Nihil autem interest, utrum ipse dominus tradat alicui

rem, an voluntate eius alius. Qua ratione, si cui libera negotiorum administratio a domino permissa fuerit isque ex his negotiis rem vendiderit et tradiderit, facit eam accipientis. Interdum etiam sine traditione nuda voluntas sufficit domini ad rem transferendam, veluti si rem, quam tibi aliquis commodavit aut locavit aut apud te deposuit, vendiderit tibi aut donaverit; quamvis enim ex ea causa tibi eam non tradiderit, eo tamen ipso, quod patitur tuam esse, statim adquiritur tibi proprietas perinde ac si eo nomine tradita fuisset. Item si quis merces in horreo depositas vendiderit, simul atque claves horrei tradiderit emptori, transfert proprietatem mercium ad emptorem.

Hoc amplius interdum et in incertam personam collocata voluntas domini transfert rei proprietatem; ut ecce praetores vel consules, qui missilia iactant in vulgus, ignorant, quid eorum quisque excepturus sit, et tamen, quia volunt quod quisque exceperit eius esse, statim eum dominum efficiunt. Qua ratione verius esse videtur et, si rem pro derelicto a domino habitam occupaverit quis, statim eum dominum effici. Pro derelicto autem habetur, quod dominus ea mente abiecerit, ut id rerum suarum esse nollet, ideoque statim dominus esse desinit.

Alia causa est earum rerum, quae in tempestate maris levandae navis causa eiciuntur. Hae enim dominorum permanent, quia palam est eas non eo animo eici, quo quis eas habere non vult, sed quo magis cum ipsa nave periculum maris effugiat; qua de causa si quis eas fluctibus expulsas vel etiam in ipso mari nactus lucrandi animo abstulerit, furtum committit. Nec longe discedere videntur ab his, quae de rheda currente non intellegentibus dominis cadunt.

Inst. II, 1.

DE REBUS INCORPORALIBUS

Quaedam praeterea res corporales sunt, quaedam incorporales. Corporales hae sunt, quae sui natura tangi possunt; veluti fundus, homo, vestis, aurum, argentum, et

denique aliae res innumerabiles. Incorporales autem sunt, quae tangi non possunt, qualia sunt ea, quae in iure consistunt; sicut hereditas, usus fructus, obligationes quoquo modo contractae. Nec ad rem pertinet, quod in hereditate res corporales continentur; nam et fructus, qui ex fundo percipiuntur, corporales sunt et id, quod ex aliqua obligatione nobis debetur, plerumque corporale est, veluti fundus, homo, pecunia; nam ipsum ius hereditatis et ipsum ius utendi fruendi et ipsum ius obligationis incorporale est. Eodem numero sunt iura praediorum urbanorum et rusticorum, quae etiam servitutes vocantur.

Inst. II, 2.

DE SERVITUTIBUS

Rusticorum praediorum iura sunt haec: iter, actus, via, aquae ductus. Iter est ius eundi ambulandi homini, non etiam iumentum agendi vel vehiculum; actus est ius agendi vel iumentum vel vehiculum; itaque qui iter habet, actum non habet; qui actum habet, et iter habet eoque uti potest etiam sine iumento. Via est ius eundi et agendi et ambulandi; nam et iter et actum in se via continet. Aquae ductus est ius aquae ducendae per fundum alienum.

Praediorum urbanorum sunt servitutes, quae aedificiis inhaerent, ideo urbanorum praediorum dictae, quoniam aedificia omnia urbana praedia appellantur, etsi in villa aedificata sunt. Item praediorum urbanorum servitutes sunt hae: ut vicinus onera vicini sustineat; ut in parietem eius liceat vicino tignum immittere; ut stillicidium vel flumen recipiat quis in aedes suas vel in aream, vel non recipiat; et ne altius tollat quis aedes suas, ne luminibus vicini officiatur. In rusticorum praediorum servitutes quidam computari recte putant aquae haustum, pecoris ad aquam adpulsum, ius pascendi, calcis coquendae, harenae fodiendae.

Ideo autem hae servitutes praediorum appellantur, quoniam sine praediis constitui non possunt. Nemo enim

potest servitutem adquirere urbani vel rustici praedii, nisi qui habet praedium, nec quisquam debere, nisi qui habet praedium. Si quis velit vicino aliquod ius constituere, pactionibus atque stipulationibus id efficere debet. Potest etiam in testamento quis heredem suum damnare, ne altius tollat, ne luminibus aedium vicini officiat; vel ut patiatur eum tignum in parietem immittere vel stillicidium habere; vel ut patiatur eum per fundum ire, agere, aquamve ex eo ducere.

Inst. II, 3.

DE USU FRUCTU

Usus fructus est ius alienis rebus utendi fruendi salva rerum substantia; est enim ius in corpore; quo sublato et ipsum tolli necesse est. Usus fructus a proprietate separationem recipit idque plurimis modis accidit, ut ecce si quis alicui usum fructum legaverit; nam heres nudam habet proprietatem, legatarius usum fructum; et contra si fundum legaverit deducto usu fructu, legatarius nudam habet proprietatem, heres vero usum fructum; item alii usum fructum, alii deducto eo fundum legare potest. Sine testamento vero si quis velit alii usum fructum constituere, pactionibus et stipulationibus id efficere debet. Ne tamen in universum inutiles essent proprietates semper abscedente usu fructu, placuit certis modis extingui usum fructum et ad proprietatem reverti.

Constituitur autem usus fructus non tantum in fundo et aedibus, verum etiam in servis et iumentis ceterisque rebus exceptis his quae ipso usu consumuntur; nam eae neque naturali ratione neque civili recipiunt usum fructum. Quo numero sunt vinum, oleum, frumentum, vestimenta. Quibus proxima est pecunia numerata; namque in ipso usu adsidua permutatione quodammodo extinguitur. Sed utilitatis causa senatus censuit posse etiam earum rerum usum fructum constitui, ut tamen eo nomine heredi utiliter caveatur. Itaque si pecuniae usus fructus legatus sit, ita datur

legatario, ut eius fiat, et legatarius satisdat heredi de tanta pecunia restituenda, si morietur aut capite minuetur. Ceterae quoque res ita traduntur legatario, ut eius fiant; sed aestimatis his satisdatur, ut, si morietur aut capite minuetur, tanta pecunia restituatur, quanti eae fuerint aestimatae. Ergo senatus non fecit quidem earum rerum usum fructum (nec enim poterat), sed per cautionem quasi usum fructum constituit.

Finitur autem usus fructus morte fructuarii et duabus capitis deminutionibus, maxima et media, et non utendo per modum et tempus. Quae omnia nostra statuit constitutio. Item finitur usus fructus, si domino proprietatis ab usufructuario cedatur (nam extraneo cedendo nihil agitur); vel ex contrario si fructuarius proprietatem rei adquisierit, quae res consolidatio appellatur. Eo amplius constat, si aedes incendio consumptae fuerint vel etiam terrae motu aut vitio suo corruerint, extingui usum fructum et ne areae quidem usum fructum deberi. Cum autem finitus fuerit usus fructus, revertitur scilicet ad proprietatem et ex eo tempore nudae proprietatis dominus incipit plenam habere in re potestatem.

Inst. II, 4.

DE USU ET HABITATIONE

Isdem istis modis, quibus usus fructus constituitur, etiam nudus usus constitui solet isdemque illis modis finitur, quibus et usus fructus desinit. Minus autem scilicet iuris in usu est quam in usu fructu. Namque is, qui fundi nudum usum habet, nihil ulterius habere intellegitur, quam ut oleribus, pomis, floribus, feno, stramentis, lignis ad usum cottidianum utatur; in eoque fundo hactenus ei morari licet, ut neque domino fundi molestus sit neque his, per quos opera rustica fiunt, impedimento sit; nec ulli alii ius quod habet aut vendere aut locare aut gratis concedere potest, cum is qui usum fructum habet potest haec omnia facere.

Item is, qui aedium usum habet, hactenus iuris habere

intellegitur, ut ipse tantum habitet, nec hoc ius ad alium transferre potest; et vix receptum videtur, ut hospitem ei recipere liceat. Et cum uxore sua liberisque suis, item libertis nec non aliis liberis personis, quibus non minus quam servis utitur, habitandi ius habeat, et convenienter si ad mulierem usus aedium pertineat, cum marito ei habitare liceat.

Item is, ad quem servi usus pertinet, ipse tantum operis atque ministerio eius uti potest; ad alium vero nullo modo ius suum transferre ei concessum est. Idem scilicet iuris est et in iumento. Sed si pecoris vel ovium usus legatus fuerit, neque lacte neque agnis neque lana utetur usuarius, quia ea in fructu sunt. Plane ad stercorandum agrum suum pecoribus uti potest.

Sed si cui habitatio legata sive aliquo modo constituta sit, neque usus videtur neque usus fructus sed quasi proprium aliquod ius. Quam habitationem habentibus propter rerum utilitatem secundum Marcelli sententiam nostra decisione promulgata permisimus non solum in ea degere, sed etiam aliis locare.

Haec de servitutibus et usu fructu et usu et habitatione dixisse sufficiat. De hereditate autem et de obligationibus suis locis proponamus. Exposuimus summatim, quibus modis iure gentium res adquiruntur; modo videamus, quibus modis legitimo et civili iure adquiruntur.

Inst. II, 5.

DE USUCAPIONIBUS ET LONGI TEMPORIS POSSESSIONIBUS

Iure civili constitutum fuerat, ut, qui bona fide ab eo, qui dominus non erat, cum crediderit eum dominum esse, rem emerit vel ex donatione aliave qua iusta causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum in Italico solo usucapiat, ne rerum dominia in incerto essent. Et cum hoc placitum erat, putantibus antiquioribus dominis sufficere ad inquirendas res suas praefata

tempora, nobis melior sententia resedit, ne domini maturius suis rebus defraudentur neque certo loco beneficium hoc concludatur. Et ideo constitutionem super hoc promulgavimus, qua cautum est, ut res quidem mobiles per triennium usucapiantur, immobiles vero per longi temporis possessionem, id est inter praesentes decennio, inter absentes viginti annis usucapiantur et his modis non solum in Italia, sed in omni terra, quae nostro imperio gubernatur, dominium rerum iusta causa possessionis praecedente adquiratur.

Sed aliquando etiamsi maxime quis bona fide rem possederit, non tamen illi usucapio ullo tempore procedit, veluti si quis liberum hominem vel rem sacram vel religiosam vel servum fugitivum possideat. Furtivae quoque res et quae vi possessae sunt, nec si praedicto longo tempore bona fide possessae fuerint, usucapi possunt; nam furtivarum rerum lex duodecim tabularum et lex Atinia inhibet usucapionem, vi possessarum lex Iulia et Plautia.

Quod autem dictum est furtivarum et vi possessarum rerum usucapionem per legem prohibitam esse, non eo pertinet, ut ne ipse fur quive per vim possidet usucapere possit; nam his alia ratione usucapio non competit, quia scilicet mala fide possident: sed ne ullus alius, quamvis ab eis bona fide emerit vel ex alia causa acceperit, usucapiendi ius habeat. Unde in rebus mobilibus non facile procedit, ut bonae fidei possessori usucapio competat. Nam qui alienam rem vendidit vel ex alia causa tradidit, furtum eius committit.

Sed tamen id aliquando aliter se habet. Nam si heres rem defuncto commodatam aut locatam vel apud eum depositam existimans hereditariam esse bona fide accipienti vendiderit aut donaverit aut dotis nomine dederit, quin is qui acceperit usucapere possit, dubium non est, quippe ea res in furti vitium non ceciderit, cum utique heres, qui bona fide tamquam suam alienaverit, furtum non committit. Item si is, ad quem ancillae usus fructus pertinet, partum suum esse credens vendiderit aut donaverit, furtum non commit-

tit; furtum enim sine affectu furandi non committitur. Aliis quoque modis accidere potest, ut quis sine vitio furti rem alienam ad aliquem transferat et efficiat, ut a possessore usucapiatur.

Quod autem ad eas res, quae solo continentur, expeditius procedit, ut quis loci vacantis possessionem propter absentiam aut neglegentiam domini, aut quia sine successore decesserit, sine vi nanciscatur. Qui quamvis ipse mala fide possidet, quia intellegit se alienum fundum occupasse, tamen, si alii bona fide accipienti tradiderit, poterit ei longa possessione res adquiri, quia neque furtivum neque vi possessum accepit. Abolita est enim quorundam veterum sententia existimantium etiam fundi locive furtum fieri et eorum, qui res soli possident, principalibus constitutionibus prospicitur, ne cui longa et indubitata possessio auferri debeat.

Aliquando etiam furtiva vel vi possessa res usucapi potest; veluti si in domini potestatem reversa fuerit; tunc enim vitio rei purgato procedit eius usucapio. Res fisci nostri usucapi non potest. Sed Papinianus scribit bonis vacantibus fisco nondum nuntiatis bona fide emptorem sibi traditam rem ex his bonis usucapere posse; et ita divus Pius et divus Severus et Antoninus rescripserunt. Novissime sciendum est rem talem esse debere, ut in se non habeat vitium, ut a bona fide emptore usucapi possit vel qui ex alia iusta causa possidet.

Error autem falsae causae usucapionem non parit. Veluti si quis, cum non emerit, emisse se existimans possideat; vel cum ei donatum non fuerat, quasi ex donatione possideat.

Diutina possessio, quae prodesse coeperat defuncto, et heredi et bonorum possessori continuatur, licet ipse sciat praedium alienum; quodsi ille initium iustum non habuit, heredi et bonorum possessori licet ignoranti possessio non prodest. Quod nostra constitutio similiter et in usucapionibus observari constituit, ut tempora continuentur. Inter venditorem quoque et emptorem coniungi tempora divus Severus et Antoninus rescripserunt.

Edicto divi Marci cavetur eum, qui a fisco rem alienam emit, si post venditionem quinquennium praeterierit, posse dominum rei per exceptionem repellere. Constitutio autem divae memoriae Zenonis bene prospexit his, qui a fisco per venditionem vel donationem vel alium titulum aliquid accipiunt, ut ipsi quidem securi statim fiant et victores existant, sive conveniantur sive experiantur; adversus sacratissimum autem aerarium usque ad quadriennium liceat intendere his, qui pro dominio vel hypotheca earum rerum, quae alienatae sunt, putaverint sibi quasdam competere actiones. Nostra autem divina constitutio, quam nuper promulgavimus, etiam de his, qui a nostra vel venerabilis Augustae domo aliquid acceperint, haec statuit, quae in fiscalibus alienationibus praefatae Zenonianae constitutioni continentur.

Inst. II, 6.

DE DONATIONIBUS

Est etiam aliud genus adquisitionis donatio. Donationum autem duo genera sunt: mortis causa et non mortis causa. Mortis causa donatio est, quae propter mortis fit suspicionem, cum quis ita donat, ut, si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixisset qui donavit, reciperet, vel si eum donationis paenituisset aut prior decesserit is cui donatum sit. Hae mortis causa donationes ad exemplum legatorum redactae sunt per omnia. Nam cum prudentibus ambiguum fuerat, utrum donationis an legati instar eam optinere oporteret, et utriusque causae quaedam habebat insignia et alii ad aliud genus eam retrahebant, a nobis constitutum est, ut per omnia fere legatis connumeretur et sic procedat, quemadmodum eam nostra formavit constitutio. Et in summa mortis causa donatio est, cum magis se quis velit habere, quam eum cui donatur, magisque eum cui donat, quam heredem suum. Sic et apud Homerum Telemachus donat Piraeo.

Aliae autem donationes sunt, quae sine ulla mortis cogi-

tatione fiunt, quas inter vivos appellamus. Quae omnino non comparantur legatis; quae si fuerint perfectae, temere revocari non possunt. Perficiuntur autem, cum donator suam voluntatem scriptis aut sine scriptis manifestaverit; et ad exemplum venditionis nostra constitutio eas etiam in se habere necessitatem traditionis voluit, ut, et si non tradantur, habeant plenissimum et perfectum robur et traditionis necessitas incumbat donatori. Et cum retro principum dispositiones insinuari eas actis intervenientibus volebant, si maiores ducentorum fuerant solidorum, nostra constitutio et quantitatem usque ad quingentos solidos ampliavit, quam stare et sine insinuatione statuit, et quasdam donationes invenit, quae penitus insinuationem fieri minime desiderant, sed in se plenissimam habent firmitatem. Alia insuper multa ad uberiorem exitum donationum invenimus, quae omnia ex nostris constitutionibus, quas super his posuimus, colligenda sunt. Sciendum tamen est, quod, etsi plenissimae sint donationes, tamen si ingrati existant homines, in quos beneficium collatum est, donatoribus per nostram constitutionem licentiam praestavimus certis ex causis eas revocare, ne, qui suas res in alios contulerunt, ab his quandam patiantur iniuriam vel iacturam, secundum enumeratos in nostra constitutione modos.

Est et aliud genus inter vivos donationum, quod veteribus quidem prudentibus penitus erat incognitum, postea autem a iunioribus divis principibus introductum est, quod ante nuptias vocabatur et tacitam in se condicionem habebat, ut tunc ratum esset, cum matrimonium fuerit insecutum; ideoque ante nuptias appellabatur, quod ante matrimonium efficiebatur et nusquam post nuptias celebratas talis donatio procedebat. Sed primus quidem divus Justinus pater noster, cum augeri dotes et post nuptias fuerat permissum, si quid tale evenit, etiam ante nuptias donationem augeri et constante matrimonio sua constitutione permisit; sed tamen nomen inconveniens remanebat, cum ante nuptias quidem vocabatur, post nuptias autem tale accipiebat incrementum. Sed nos plenissimo fini tradere sanctiones cupientes et con-

sequentia nomina rebus esse studentes constituimus, ut tales donationes non augeantur tantum, sed et constante matrimonio initium accipiant et non ante nuptias sed propter nuptias vocentur et dotibus in hoc exaequentur, ut, quemadmodum dotes et constante matrimonio non solum augentur, sed etiam fiunt, ita et istae donationes, quae propter nuptias introductae sunt, non solum antecedant matrimonium, sed etiam eo contracto et augeantur et constituantur.

Erat olim et alius modus civilis adquisitionis per ius adcrescendi, quod est tale: si communem servum habens aliquis cum Titio solus libertatem ei imposuit vel vindicta vel testamento, eo casu pars eius amittebatur et socio adcrescebat. Sed cum pessimo fuerat exemplo et libertate servum defraudari et ex ea humanioribus quidem dominis damnum inferri, severioribus autem lucrum adcrescere, hoc quasi invidiae plenum pio remedio per nostram constitutionem mederi necessarium duximus et invenimus viam, per quam et manumissor et socius eius et qui libertatem accepit nostro fruantur beneficio, libertate cum effectu procedente (cuius favore et antiquos legislatores multa et contra communes regulas statuisse manifestissimum est) et eo qui eam imposuit suae liberalitatis stabilitate gaudente et socio indemni conservato pretiumque servi secundum partem dominii, quod nos definivimus, accipiente.

Inst. II, 7.

QUIBUS ALIENARE LICET VEL NON

Accidit aliquando, ut qui dominus sit alienare non possit et contra qui dominus non sit alienandae rei potestatem habeat. Nam dotale praedium maritus invita muliere per legem Iuliam prohibetur alienare, quamvis ipsius sit dotis causa ei datum. Quod nos legem Iuliam corrigentes in meliorem statum deduximus. Cum enim lex in soli tantummodo rebus locum habebat, quae Italicae fuerant, et alienationes inhibebat, quae invita muliere fiebant, hypothecas autem earum etiam volente, utrisque remedium imposuimus, ut etiam in eas

res, quae in provinciali solo positae sunt, interdicta fiat alienatio vel obligatio et neutrum eorum neque consentientibus mulieribus procedat, ne sexus muliebris fragilitas in perniciem substantiae earum converteretur.

Contra autem creditor pignus ex pactione, quamvis eius ea res non sit, alienare potest. Sed hoc forsitan ideo videtur fieri, quod voluntate debitoris intellegitur pignus alienare, qui ab inito contractus pactus est, ut liceret creditori pignus vendere, si pecunia non solvatur. Sed ne creditores ius suum persequi impedirentur neque debitores temere suarum rerum dominium amittere videantur, nostra constitutione consultum est et certus modus impositus est, per quem pignorum distractio possit procedere, cuius tenore utrique parti creditorum et debitorum satis abundeque provisum est.

Nunc admonendi sumus neque pupillum neque pupillam ullam rem sine tutoris auctoritate alienare posse. Ideoque si mutuam pecuniam alicui sine tutoris auctoritate dederit, non contrahit obligationem, quia pecuniam non facit accipientis. Ideoque vindicare nummos possunt, sicubi extent; sed si nummi, quos mutuos dedit, ab eo qui accepit bona fide consumpti sunt, condici possunt, si mala fide, ad exhibendum de his agi potest. At ex contrario omnes res pupillo et pupillae sine tutoris auctoritate recte dari possunt. Ideoque si debitor pupillo solvat, necessaria est tutoris auctoritas; alioquin non liberabitur. Sed etiam hoc evidentissima ratione statutum est in constitutione, quam ad Caesarienses advocatos ex suggestione Triboniani viri eminentissimi quaestoris sacri palatii nostri promulgavimus, qua dispositum est ita licere tutori vel curatori debitorem pupillarem solvere, ut prius sententia iudicialis sine omni damno celebrata hoc permittat. Quo subsecuto, si et iudex pronuntiaverit et debitor solverit, sequitur huiusmodi solutionem plenissima securitas. Sin autem aliter quam disposuimus solutio facta fuerit et pecuniam salvam habeat pupillus aut ex ea locupletior sit et adhuc eandem summam pecuniae petat, per exceptionem doli mali sum-

moveri poterit; quodsi aut male consumpserit aut furto amiserit, nihil proderit debitori doli mali exceptio, sed nihilominus damnabitur, quia temere sine tutoris auctoritate et non secundum nostram dispositionem solverit. Sed ex diverso pupilli vel pupillae solvere sine tutore auctore non possunt, quia id quod solvunt non fit accipientis, cum scilicet nullius rei alienatio eis sine tutoris auctoritate concessa est.

Inst. II, 8.

PER QUAS PERSONAS NOBIS ADQUIRITUR

Adquiritur nobis non solum per nosmet ipsos, sed etiam per eos quos in potestate habemus; item per eos servos, in quibus usum fructum habemus; item per homines liberos et servos alienos quos bona fide possidemus. De quibus singulis diligentius dispiciamus.

Igitur liberi vestri utriusque sexus, quos in potestate habetis, olim quidem, quidquid ad eos pervenerat (exceptis videlicet castrensibus peculiis), hoc parentibus suis adquirebant sine ulla distinctione; et hoc ita parentum fiebat, ut esset eis licentia, quod per unum vel unam eorum adquisitum est, alii vel extraneo donare vel vendere vel quocumque modo voluerant applicare. Quod nobis inhumanum visum est et generali constitutione emissa et liberis pepercimus et patribus debitum reservavimus. Sancitum etenim a nobis est, ut, si quid ex re patris ei obveniat, hoc secundum antiquam observationem totum parenti adquirat (quae enim invidia est, quod ex patris occasione profectum est, hoc ad eum reverti?); quod autem ex alia causa sibi filius familias adquisivit, huius usum fructum quidem patri adquiret, dominium autem apud eum remaneat, ne, quod ei suis laboribus vel prospera fortuna accessit, hoc in alium perveniens luctuosum ei procedat.

Hocque a nobis dispositum est et in ea specie, ubi parens emancipando liberum ex rebus quae adquisitionem effugiunt sibi partem tertiam retinere si voluerat licentiam ex an-

terioribus constitutionibus habebat quasi pro pretio quodammodo emancipationis et inhumanum quid accidebat, ut filius rerum suarum ex hac emancipatione dominio pro parte defraudetur et, quod honoris ei ex emancipatione additum est, quod sui iuris effectus est, hoc per rerum deminutionem decrescat. Ideoque statuimus, ut parens pro tertia bonorum parte dominii, quam retinere poterat, dimidiam non dominii rerum, sed usus fructus retineat; ita etenim et res intactae apud filium remanebunt et pater ampliore summa fruetur pro tertia dimidia potiturus.

Item vobis adquiritur, quod servi vestri ex traditione nanciscuntur sive quid stipulentur vel ex qualibet alia causa adquirunt. Hoc enim vobis et ignorantibus et invitis obvenit. Ipse enim servus qui in potestate alterius est nihil suum habere potest. Sed si heres institutus sit, non alias nisi iussu vestro hereditatem adire potest; et si iubentibus vobis adierit, vobis hereditas adquiritur, perinde ac si vos ipsi heredes instituti essetis. Et convenienter scilicet legatum per eos vobis adquiritur. Non solum autem proprietas per eos quos in potestate habetis adquiritur vobis, sed etiam possessio; cuiuscumque enim rei possessionem adepti fuerint, id vos possidere videmini. Unde etiam per eos usucapio vel longi temporis possessio vobis accedit.

De his autem servis, in quibus tantum usum fructum habetis, ita placuit, ut, quidquid ex re vestra vel ex operibus suis adquirant, id vobis adiciatur, quod vero extra eas causas persecuti sunt, id ad dominum proprietatis pertineat. Itaque si is servus heres institutus sit legatumve quid ei aut donatum fuerit, non usufructuario, sed domino proprietatis adquiritur. Idem placet et de eo, qui a vobis bona fide possidetur, sive is liber sit sive alienus servus; quod enim placuit de usufructuario, idem placet et de bonae fidei possessore. Itaque quod extra duas istas causas adquiritur, id vel ad ipsum pertinet, si liber est, vel ad dominum, si servus est. Sed bonae fidei possessor cum usuceperit servum, quia eo modo dominus fit, ex omnibus causis per eum sibi adquirere potest; fructuarius vero usucapere non po-

test, primum quia non possidet, sed habet ius utendi fruendi, deinde quia scit servum alienum esse. Non solum autem proprietas per eos servos, in quibus usum fructum habetis vel quos bona fide possidetis, vel per liberam personam, quae bona fide vobis servit, adquiritur vobis, sed etiam possessio; loquimur autem in utriusque persona secundum definitionem, quam proxime exposuimus, id est si quam possessionem ex re vestra vel ex operibus suis adepti fuerint.

Ex his itaque apparet per liberos homines, quos neque iuri vestro subiectos habetis neque bona fide possidetis, item per alienos servos, in quibus neque usum fructum habetis neque iustam possessionem, nulla ex causa vobis adquiri posse. Et hoc est, quod dicitur per extraneam personam nihil adquiri posse; excepto eo, quod per liberam personam veluti per procuratorem placet non solum scientibus, sed etiam ignorantibus vobis adquiri possessionem secundum divi Severi constitutionem et per hanc possessionem etiam dominium, si dominus fuit qui tradidit, vel usucapionem aut longi temporis praescriptionem, si dominus non sit.

Hactenus tantisper admonuisse sufficiat, quemadmodum singulae res adquiruntur; nam legatorum ius, quo et ipso singulae res vobis adquiruntur, item fideicommissorum, ubi singulae res vobis relinquuntur, opportunius inferiori loco referemus. Videamus itaque nunc, quibus modis per universitatem res vobis adquiruntur. Si cui ergo heredes facti sitis sive cuius bonorum possessionem petieritis vel si quem adrogaveritis vel si cuius bona libertatum conservandarum causa vobis addicta fuerint, eius res omnes ad vos transeunt. Ac prius de hereditatibus dispiciamus. Quarum duplex condicio est: nam vel ex testamento vel ab intestato ad vos pertinent. Et prius est, ut de his dispiciamus, quae vobis ex testamento obveniunt. Qua in re necessarium est initio de ordinandis testamentis exponere.

Inst. II, 9.

DE TESTAMENTIS ORDINANDIS

Testamentum ex eo appellatur, quod testatio mentis est. Sed ut nihil antiquitatis penitus ignoretur, sciendum est olim quidem duo genera testamentorum in usu fuisse, quorum altero in pace et in otio utebantur, quod calatis comitiis appellabatur, altero, cum in proelium exituri essent, quod procinctum dicebatur. Accessit deinde tertium genus testamentorum, quod dicebatur per aes et libram, scilicet quia per emancipationem, id est imaginariam quandam venditionem, agebatur quinque testibus et libripende civibus Romanis puberibus praesentibus et eo qui familiae emptor dicebatur. Sed illa quidem priora duo genera testamentorum ex veteribus temporibus in desuetudinem abierunt; quod vero per aes et libram fiebat, licet diutius permansit, attamen partim et hoc in usu esse desiit.

Sed praedicta quidem nomina testamentorum ad ius civile referebantur. Postea vero ex edicto praetoris alia forma faciendorum testamentorum introducta est: iure enim honorario nulla emancipatio desiderabatur, sed septem testium signa sufficiebant, cum iure civili signa testium non erant necessaria. Sed cum paulatim tam ex usu hominum quam ex constitutionum emendationibus coepit in unam consonantiam ius civile et praetorium iungi, constitutum est, ut uno eodemque tempore, quod ius civile quodammodo exigebat, septem testibus adhibitis et subscriptione testium, quod ex constitutionibus inventum est, et ex edicto praetoris signacula testamentis imponerentur; ut hoc ius tripertitum esse videatur, ut testes quidem et eorum praesentia uno contextu testamenti celebrandi gratia a iure civili descendant, subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur, signacula autem et numerus testium ex edicto praetoris.

Sed his omnibus ex nostra constitutione propter testamentorum sinceritatem, ut nulla fraus adhibeatur, hoc additum est, ut per manum testatoris vel testium nomen heredis ex-

primatur et omnia secundum illius constitutionis tenorem procedant.

Possunt autem testes omnes et uno anulo signare testamentum (quid enim, si septem anuli una sculptura fuerint?) secundum quod Pomponio visum est. Sed et alieno quoque anulo licet signare. Testes autem adhiberi possunt ii, cum quibus testamenti factio est. Sed neque mulier neque impubes neque servus neque mutus neque surdus neque furiosus nec cui bonis interdictum est nec is, quem leges iubent improbum intestabilemque esse, possunt in numero testium adhiberi. Sed cum aliquis ex testibus testamenti quidem faciendi tempore liber existimabatur, postea vero servus apparuit, tam divus Hadrianus Catonio Vero quam postea divi Severus et Antoninus rescripserunt subvenire se ex sua liberalitate testamento, ut sic habeatur, atque si ut oportet factum esset, cum eo tempore, quo testamentum signaretur, omnium consensu hic testis liberorum loco fuerit nec quisquam esset, qui ei status quaestionem moveat.

Pater nec non is, qui in potestate eius est, item duo fratres, qui in eiusdem patris potestate sunt, utrique testes in unum testamentum fieri possunt; quia nihil nocet ex una domo plures testes alieno negotio adhiberi. In testibus autem non debet esse qui in potestate testatoris est. Sed si filius familias de castrensi peculio post missionem faciat testamentum, nec pater eius recte testis adhibetur nec is qui in potestate eiusdem patris est; reprobatum est enim in ea re domesticum testimonium.

Sed neque heres scriptus neque is qui in potestate eius est neque pater eius qui habet eum in potestate neque fratres qui in eiusdem patris potestate sunt testes adhiberi possunt, quia totum hoc negotium, quod agitur testamenti ordinandi gratia, creditur hodie inter heredem et testatorem agi. Licet enim totum ius tale conturbatum fuerat et veteres, qui familiae emptorem et eos, qui per potestatem ei coadunati fuerant, testamentariis testimoniis repellebant, heredi et his, qui coniuncti ei per potestatem fuerant, concedebant testimonia in testamentis praestare, licet hi, qui id

permittebant, hoc iure minime abuti debere eos suadebant; tamen nos eandem observationem corrigentes et, quod ab illis suasum est, in legis necessitatem transferentes ad imitationem pristini familiae emptoris merito nec heredi, qui imaginem vetustissimi familiae emptoris optinet, nec aliis personis, quae ei ut dictum est coniunctae sunt, licentiam concedimus sibi quodammodo testimonia praestare; ideoque nec eiusmodi veterem constitutionem nostro codici inseri permisimus.

Legatariis autem et fideicomissariis, quia non iuris successores sunt, et aliis personis eis coniunctis testimonium non denegamus, immo in quadam nostra constitutione et hoc specialiter concessimus, et multo magis his, qui in eorum potestate sunt, vel qui eos habent in potestate, huiusmodi licentiam damus.

Nihil autem interest, testamentum in tabulis an in chartis membranisve vel in alia materia fiat. Sed et unum testamentum pluribus codicibus conficere quis potest, secundum optinentem tamen observationem omnibus factis. Quod interdum et necessarium est, si quis navigaturus et secum ferre et domi relinquere iudiciorum suorum contestationem velit, vel propter alias innumerabiles causas, quae humanis necessitatibus imminent. Sed haec quidem de testamentis, quae in scriptis conficiuntur. Si quis autem voluerit sine scriptis ordinare iure civili testamentum, septem testibus adhibitis et sua voluntate coram eis nuncupata sciat hoc perfectissimum testamentum iure civili firmumque constitutum.

Inst. II, 10.

DE MILITARI TESTAMENTO

Supra dicta diligens observatio in ordinandis testamentis militibus propter nimiam imperitiam constitutionibus principalibus remissa est. Nam quamvis hi neque legitimum numerum testium adhibuerint neque aliam testamentorum sollemnitatem observaverint, recte nihilominus testantur,

videlicet cum in expeditionibus occupati sunt; quod merito nostra constitutio induxit. Quoquo enim modo voluntas eius suprema sive scripta inveniatur sive sine scriptura, valet testamentum ex voluntate eius. Illis autem temporibus, per quae citra expeditionum necessitatem in aliis locis vel in suis sedibus degunt, minime ad vindicandum tale privilegium adiuvantur; sed testari quidem et si filii familias sunt propter militiam conceduntur, iure tamen communi, ea observatione et in eorum testamentis adhibenda, quam et in testamentis paganorum proxime exposuimus.

Plane de militum testamentis divus Traianus Statilio Severo ita rescripsit: "Id privilegium, quod militantibus datum est, ut quoquo modo facta ab his testamenta rata sint, sic intellegi debet, ut utique prius constare debeat testamentum factum esse, quod et sine scriptura a non militantibus quoque fieri potest. Is ergo miles, de cuius bonis apud te quaeritur, si convocatis ad hoc hominibus, ut voluntatem suam testaretur, ita locutus est, ut declararet, quem vellet sibi esse heredem et cui libertatem tribuere, potest videri sine scripto hoc modo esse testatus et voluntas eius rata habenda est. Ceterum si, ut plerumque sermonibus fieri solet, dixit alicui: 'ego te heredem facio' aut 'tibi bona mea relinquo', non oportet hoc pro testamento observari. Nec ullorum magis interest quam ipsorum, quibus id privilegium datum est, eiusmodi exemplum non admitti; alioquin non difficulter post mortem alicuius militis testes existerent, qui adfirmarent se audisse dicentem aliquem relinquere se bona, cui visum sit, et per hoc iudicia vera subvertantur."

Quin immo et mutus et surdus miles testamentum facere possunt. Sed hactenus hoc illis a principalibus constitutionibus conceditur, quatenus militant et in castris degunt; post missionem vero veterani vel extra castra si faciant adhuc militantes testamentum, communi omnium civium Romanorum iure facere debent. Et quod in castris fecerint testamentum non communi iure, sed quomodo voluerint, post missionem intra annum tantum valebit. Quid igitur si intra annum quidem decesserit, condicio autem heredi

adscripta post annum extiterit? an quasi militis testamentum valeat? et placet valere quasi militis.

Sed et si quis ante militiam non iure fecit testamentum et miles factus et in expeditione degens resignavit illud et quaedam adiecit sive detraxit vel alias manifesta est militis voluntas hoc valere volentis, dicendum est valere testamentum quasi ex nova militis voluntate. Denique et si in adrogationem datus fuerit miles vel filius familias emancipatus est, testamentum eius quasi militis ex nova voluntate valet nec videtur capitis deminutione irritum fieri.

Sciendum tamen est, quod ad exemplum castrensis peculii tam anteriores leges quam principales constitutiones quibusdam quasi castrensia dederunt peculia, quorum quibusdam permissum erat etiam in potestate degentibus testari. Quod nostra constitutio latius extendens permisit omnibus in his tantummodo peculiis testari quidem, sed iure communi; cuius constitutionis tenore perspecto licentia est nihil eorum quae ad praefatum ius pertinent ignorare.

Inst. II, 11.

PART TWO

THE LAW OF OBLIGATIONS

PRELIMINARY DEFINITIONS

Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum.

Paul. Dig. XLIV, 7, 3, Pr.

Post litem contestatam cum eo perpetuatur adversus eum obligatio.

Ulp. Dig. XII, 2, 9, 3.

Princeps 'bona' concedendo videtur etiam obligationes concedere.

Paul. Dig. L, 16, 21.

'Debitor' intellegitur is, a quo invito exigi pecunia potest.

Mod. Dig. L, 16, 108.

'Creditorum' appellatione non hi tantum accipiuntur, qui pecuniam crediderunt, sed omnes, quibus ex qualibet causa debetur.

Gaius, Dig. L, 16, 11.

THE ORIGIN OF CONTRACTUAL OBLIGATIONS

Ius Iurandum

Foedera alia aliis legibus, ceterum eodem modo omnia fiunt. Tum ita factum accepimus, nec ullius vetustior foederis memoria est. Fetialis regem Tullum ita rogavit: "Iubesne me, rex, cum patre patrato populi Albani foedus ferire?" Iubente rege "Sagmina" inquit "te, rex posco." Rex ait "Puram tollito." Fetialis ex arce graminis herbam puram attulit. Postea regem ita rogavit: "Rex, facisne me tu regium nuntium populi Romani Quiritium, vasa comites-

que meos?" Rex respondit: "Quod sine fraude mea populique Romani Quiritium fiat, facio." Fetialis erat M. Valerius. Is patrem patratum Spurium Fusium fecit verbena caput capillosque tangens. Pater patratus ad ius iurandum patrandum, id est sanciendum fit foedus, multisque id verbis, quae longo effata carmine non operae est referre, peragit.

Legibus deinde recitatis "Audi" inquit, "Iuppiter, audi, pater patrate populi Albani, audi tu, populus Albanus: ut illa palam prima postrema ex illis tabulis cerave recitata sunt sine dolo malo, utique ea hic hodie rectissime intellecta sunt, illis legibus populus Romanus prior non deficiet. Si prior defexit publico consilio dolo malo, tum tu, ille Diespiter, populum Romanum sic ferito, ut ego hunc porcum hic hodie feriam, tantoque magis ferito, quanto magis potes pollesque." Id ubi dixit, porcum saxo silice percussit. Sua item carmina Albani suumque ius iurandum per suum dictatorem suosque sacerdotes peregerunt.

Liv. I, 24, 4-9.

Lapidem silicem tenebant iuraturi per Iovem, haec verba dicentes: "Si sciens fallo, tum me Dispiter salva urbe arceque bonis eiciat, ut ego hunc lapidem".

Festus P. 115, in Bruns: Fon. Iur. Rom., Pars Post. p. 12.

Nexum

Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita ius esto.

XII Tab. VI, 1, in Bruns, p. 25.

Nexum Manilius scribit omne quod per libram et aes geritur, in quo sint mancipia; Mucius, quae per aes et libram fiant ut obligentur, praeter quae mancipio dentur.

Varro, L. L. VII, 105, in Bruns, Pars Post., p. 60.

Mancipatio

Est autem mancipatio, ut supra quoque diximus, imagi-

naria quaedam venditio; quod et ipsum ius proprium civium Romanorum est, eaque res ita agitur: adhibitis non minus quam quinque testibus civibus Romanis puberibus et praeterea alio eiusdem condicionis, qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit, aes tenens ita dicit: HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA; deinde aere percutit libram idque aes dat ei a quo mancipio accipit quasi pretii loco.

Gaius, I, 119.

Mandatum

Tyndarus

Haec per dexteram tuam te dextera retinens manu
Obsecro, infidelior mihi ne fuas quam ego sum tibi.
Hoc age tu; tu mihi erus nunc es, tu patronus, tu pater;
Tibi commendo spes opesque meas.

Philocrates

Mandavisti satis.
Satin habes mandata quae sunt facta si refero?

Tyndarus

Satis.

Plautus, Captivi, 442-446.

Sponsio

Spondere Verrius putat dictum, quod 'sponte sua', id est voluntate, promittatur; deinde oblitus inferiore capite sponsum et sponsam ex Graeco dictam ait, quod ii σπονδάς interpositis rebus divinis faciant.

Festus F. 329, in Bruns, Pars Post., p. 40.

Sed haec quidem verborum obligatio DARI SPONDES? SPONDEO propria civium Romanorum est; * * * * at illa verborum obligatio DARI SPONDES? SPONDEO adeo propria civium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit, quamvis dicatur a Graeca voce figurata esse.

Gaius, III, 93.

Stipulatio

'Sponsio' appellatur non solum quae per sponsus interrogationem fit, sed omnis stipulatio promissioque.

Paul. Dig. L, 16, 7.

Sponsalia autem dicta sunt a spondendo; nam moris fuit veteribus stipulari et spondere sibi uxores futuras.

Ulp. Dig. XXIII, 1, 2.

Stipem esse 'nummum' signatum testimonio est et de eo quod datur 'stipendium' militi, et cum spondetur pecunia, quod 'stipulari' dicitur. *Stipem dicebant pe*cuniam signa*tam, quod stiparetur.* Ideo stipulari *dicitur is, qui in*terrogat a*lterum spondeatne stipem, id est* aes.

Festus, 297 (P. 296) and 313, in Bruns, Pars Post., p. 41.

Stipes fustis terrae defixus.

Festus, 315 (cf. 314), in Bruns, Pars Post., p. 41.

Veteres enim, quando sibi aliquid promittebant, stipulam tenentes frangebant, quam iterum iungentes sponsiones suas agnoscebant.

Isid. Orig. V, 24, 30.

Festuca

Si in rem agebatur, mobilia quidem et moventia, quae modo in ius adferri adducive possent, in iure vindicabantur

ad hunc modum: qui vindicabat festucam tenebat; deinde ipsam rem adprehendebat, veluti hominem, et ita dicebat HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO SECUNDUM SUAM CAUSAM. SICUT DIXI, ECCE TIBI, VINDICTAM INPOSUI, et simul homini festucam inponebat; adversarius eadem similiter dicebat et faciebat; cum uterque vindicasset, praetor dicebat MITTITE AMBO HOMINEM; illi mittebant; qui prior vindica*verat, ita alterum interroga*bat POSTULO ANNE DICAS, QUA EX CAUSA VINDICAVERIS; ille respondebat IUS FECI SICUT VINDICTAM INPOSUI; **** festuca autem utebantur quasi hastae loco, signo quodam iusti dominii, quod maxime sua esse credebant quae ex hostibus cepissent; unde in centumviralibus iudiciis hasta praeponitur.

Gaius, IV, 16.

IN IURE CESSIO

In iure cessio autem hoc modo fit: apud magistratum populi Romani, veluti praetorem, is cui res in iure ceditur rem tenens ita dicit HUNC EGO HOMINEM EX IURE QUIRITIUM MEUM ESSE AIO; deinde postquam hic vindicaverit, praetor interrogat eum qui cedit, an contra vindicet; quo negante aut tacente tunc ei qui vindicaverit, eam rem addicit; idque legis actio vocatur. Hoc fieri potest etiam in provinciis apud praesides earum.

Gaius, II, 24.

THE NATURE AND CLASSES OF OBLIGATIONS

Nunc transeamus ad obligationes. Obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura. Omnium autem obligationum summa divisio in duo genera diducitur: namque aut civiles sunt aut praetoriae. Civiles sunt, quae aut legibus constitutae aut certe iure civili comprobatae sunt. Praetoriae sunt, quas praetor ex sua iurisdictione constituit, quae etiam honorariae vocantur. Sequens divisio in quattuor species diducitur: aut enim ex contractu sunt aut quasi ex contractu aut ex maleficio aut quasi ex maleficio. Prius est, ut de his quae ex contractu sunt dispiciamus. Harum aeque quattuor species sunt: aut enim re contrahuntur aut verbis aut litteris aut consensu; de quibus singulis dispiciamus.

Inst., III, 13.

THE ROMAN SYSTEM OF CONTRACTUAL OBLIGATIONS

OBLIGATIONS *EX CONTRACTU*

Contracts *Re*

Mutuum

Re contrahitur obligatio veluti mutui datione. Mutui autem obligatio in his rebus consistit, quae pondere numero mensurave constant, veluti vino, oleo, frumento, pecunia numerata, aere, argento, auro; quas res aut numerando aut metiendo aut pendendo in hoc damus, ut accipientium fiant et quandoque nobis non eaedem res, sed aliae eiusdem naturae et qualitatis reddantur. Unde etiam mutuum appellatum sit, quia ita a me tibi datur, ut ex meo tuum fiat. Ex eo contractu nascitur actio quae vocatur condictio.

Is quoque, qui non debitum accepit ab eo qui per errorem solvit, re obligatur; daturque agenti contra eum propter repetitionem condicticia actio. Nam proinde ei condici potest 'si paret eum dare oportere' ac si mutuum accepisset. Unde pupillus, si ei sine tutoris auctoritate non

debitum per errorem datum est, non tenetur indebiti condictione non magis quam mutui datione. Sed haec species obligationis non videtur ex contractu consistere, cum is qui solvendi animo dat magis distrahere voluit negotium quam contrahere.

Inst. III, 14, Pr. and 1.

Si tibi dedero decem sic, ut novem debeas, Proculus ait, et recte, non amplius te ipso iure debere quam novem. Sed si dedero, ut undecim debeas, putat Proculus amplius quam decem condici non posse.

Ulp. Dig. XII, 1, 11, 1.

Si tibi decem dem et paciscar, ut viginti mihi debeantur, non nascitur obligatio ultra decem; re enim non potest obligatio contrahi, nisi quatenus datum sit.

Paul. Dig. II, 14, 17, Pr.

Si ego pecuniam tibi quasi donaturus dedero, tu quasi mutuam accipias, Iulianus scribit donationem non esse; sed an mutua sit, videndum. Et puto nec mutuam esse magisque nummos accipientis non fieri, cum alia opinione acceperit. * * * * * Si ego quasi deponens tibi dedero, tu quasi mutuam accipias, nec depositum nec mutuum est.

Ulp. Dig. XII, 1, 18, Pr. and 1.

Si nummos meos tuo nomine dedero velut tuos absente te et ignorante, Aristo scribit adquiri tibi condictionem. Iulianus quoque de hoc interrogatus libro decimo scribit veram esse Aristonis sententiam nec dubitari quin, si meam pecuniam tuo nomine voluntate tua dedero, tibi adquiritur obligatio, cum cottidie credituri pecuniam mutuam ab alio poscamus, ut nostro nomine creditor numeret futuro debitori nostro.

Ulp. Dig. XII, 1, 9, 8.

Singularia quaedam recepta sunt circa pecuniam creditam. Nam si tibi debitorem meum iussero dare pecuniam,

obligaris mihi, quamvis meos nummos non acceperis.

Ulp. Dig. XII, 1, 15.

Commodatum

Item is cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. Sed is ab eo qui mutuum accepit longe distat; namque non ita res datur, ut eius fiat, et ob id de ea re ipsa restituenda tenetur. Et is quidem qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit, veluti incendio, ruina, naufragio, aut latronum hostiumve incursu, nihilo minus obligatus permanet.

At is qui utendum accepit sane quidem exactam diligentiam custodiendae rei praestare iubetur, nec sufficit ei tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est, si modo alius diligentior poterit eam rem custodire; sed propter maiorem vim maioresve casus non tenetur, si modo non huius culpa is casus intervenerit. Alioquin si id quod tibi commodatum est peregre ferre tecum malueris et vel incursu hostium praedonumve vel naufragio amiseris, dubium non est, quin de restituenda ea re tenearis.

Commodata autem res tunc proprie intellegitur, si nulla mercede accepta vel constituta res tibi utenda data est. Alioquin mercede interveniente locatus tibi usus rei videtur; gratuitum enim debet esse commodatum.

Inst. III, 14, 2.

Ait praetor: 'Quod quis commodasse dicetur, de eo iudicium dabo.' Huius edicti interpretatio non est difficilis. Unum solummodo notandum, quod qui edictum concepit commodati fecit mentionem, cum Paconius utendi fecit mentionem. Inter commodatum autem et utendum datum Labeo quidem ait tantum interesse, quantum inter genus et speciem; commodari enim rem mobilem, non etiam soli, utendam dari etiam soli. Sed ut apparet, proprie commodata res dicitur et quae soli est, idque et Cassius existimat. Vivi-

anus amplius etiam habitationem commodari posse ait.

Ulp. Dig. XIII, 6, 1, Pr. and 1.

Sicut autem voluntatis et officii magis quam necessitatis est commodare, ita modum commodati finemque praescribere eius est qui beneficium tribuit. Cum autem id fecit, id est postquam commodavit, tunc finem praescribere et retro agere atque intempestive usum commodatae rei auferre non officium tantum impedit, sed et suscepta obligatio interdandum accipiendumque. * * * * * Igitur si pugillares mihi commodasti, ut debitor mihi caveret, non recte facies importune repetendo; nam si negasses, vel emissem vel testes adhibuissem. Idemque est, si ad fulciendam insulam tigna commodasti, deinde protraxisti, aut etiam sciens vitiosa commodaveris; adiuvari quippe nos, non decipi beneficio oportet.

Paul. Dig. XIII, 6, 17, 3.

Commodatum autem plerumque solam utilitatem continet eius cui commodatur, et ideo verior est Quinti Mucii sententia existimantis et culpam praestandam et diligentiam.

Ulp. Dig. XIII, 6, 5, 3.

Depositum

Praeterea et is, apud quem res aliqua deponitur, re obligatur et actione depositi, qui et ipse de ea re quam accepit restituenda tenetur. Sed is ex eo solo tenetur, si quid dolo commiserit, culpae autem nomine, id est desidiae atque neglegentiae, non tenetur; itaque securus est qui parum diligenter custoditam rem furto amisit, quia, qui neglegenti amico rem custodiendam tradit, suae facilitati id imputare debet.

Inst. III, 14, 3.

Si vestimenta servanda balneatori data perierunt, si quidem nullam mercedem servandorum vestimentorum accep-

it, depositi eum teneri et dolum dumtaxat praestare debere puto; quod si accepit, ex conducto.

Ulp. Dig. XVI, 3, 1, 8.

Si praedo vel fur deposuerint, et hos Marcellus libro sexto digestorum putat recte depositi acturos.

Ulp. Dig. XVI, 3, 1, 39.

Is quoque, apud quem rem aliquam deponimus, re nobis tenetur; qui et ipse de ea re quam acceperit restituenda tenetur. Sed is, etiamsi neglegenter rem custoditam amiserit, securus est; quia enim non sua gratia accipit, sed eius a quo accipit, in eo solo tenetur, si quid dolo perierit; neglegentiae vero nomine ideo non tenetur, quia qui neglegenti amico rem custodiendam committit, de se queri debet. Magnam tamen neglegentiam placuit in doli crimine cadere.

Gaius, Dig. XLIV, 7, 1, 5.

Pignus

Creditor quoque qui pignus accepit re obligatur, qui et ipse de ea ipsa re quam accepit restituenda tenetur actione pigneraticia. Sed quia pignus utriusque gratia datur, et debitoris, quo magis ei pecunia crederetur, et creditoris, quo magis ei in tuto sit creditum, placuit sufficere, quod ad eam rem custodiendam exactam diligentiam adhiberet; quam si praestiterit et aliquo fortuitu casu rem amiserit, securum esse nec impediri creditum petere.

Inst. III, 14, 4.

Ea igitur, quae diligens pater familias in suis rebus praestare solet, a creditore exiguntur.

Paul. Dig. XIII, 7, 14.

Contracts *Verbis*

Stipulatio

Verbis obligatio contrahitur ex interrogatione et respon-

su, cum quid dari fierive nobis stipulamur. Ex qua duae proficiscuntur actiones, tam condictio, si certa sit stipulatio, quam ex stipulatu, si incerta. Quae hoc nomine inde utitur, quia stipulum apud veteres firmum appellabatur, forte a stipite descendens.

In hac re olim talia verba tradita fuerunt: spondes? spondeo; promittis? promitto; fidepromittis? fidepromitto; fideiubes? fideiubeo; dabis? dabo; facies? faciam. Utrum autem Latina an Graeca vel qua alia lingua stipulatio concipiatur, nihil interest, scilicet si uterque stipulantium intellectum huius linguae habeat; nec necesse est eadem lingua utrumque uti, sed sufficit congruenter ad interrogatum respondere: quin etiam duo Graeci Latina lingua obligationem contrahere possunt. Sed haec sollemnia verba olim quidem in usu fuerunt; postea autem Leoniana constitutio lata est, quae sollemnitate verborum sublata sensum et consonantem intellectum ab utraque parte solum desiderat, licet quibuscumque verbis expressus est.

Omnis stipulatio aut pure aut in diem aut sub condicione fit. Pure veluti 'quinque aureos dare spondes?' Idque confestim peti potest. In diem, cum adiecto die quo pecunia solvatur stipulatio fit; veluti 'decem aureos primis kalendis Martiis dare spondes?' Id autem, quod in diem stipulamur, statim quidem debetur, sed peti prius quam dies veniat non potest; ac ne eo quidem ipso die, in quem stipulatio facta est, peti potest, quia totus dies arbitrio solventis tribui debet; neque enim certum est eo die, in quem promissum est, datum non esse, priusquam praetereat.

At si ita stipuleris 'decem aureos annuos quoad vivam dare spondes?', et pure facta obligatio intellegitur et perpetuatur, quia ad tempus deberi non potest; sed heres petendo pacti exceptione submovebitur.

Sub condicione stipulatio fit, cum in aliquem casum differtur obligatio, ut, si aliquid factum fuerit aut non fuerit, stipulatio committatur, veluti 'si Titius consul factus fuerit, quinque aureos dare spondes?' Si quis ita stipuletur 'si in Capitolium non ascendero, dare spondes?' perinde erit, ac

si stipulatus esset cum morietur dari sibi. Ex condicionali stipulatione tantum spes est debitum iri, eamque ipsam spem transmittimus, si, priusquam condicio existat, mors nobis contigerit.

Loca etiam inseri stipulationi solent, veluti 'Carthagine dare spondes?' Quae stipulatio licet pure fieri videatur, tamen re ipsa habet tempus iniectum, quo promissor utatur ad pecuniam Carthagine dandam. Et ideo si quis ita Romae stipuletur 'hodie Carthagine dare spondes?' inutilis erit stipulatio cum impossibilis sit repromissio.

Condiciones, quae ad praeteritum vel ad praesens tempus referuntur, aut statim infirmant obligationem aut omnino non differunt; veluti 'si Titius consul fuit' vel 'si Maevius vivit, dare spondes?' nam si ea ita non sunt, nihil valet stipulatio; sin autem ita se habent, statim valet; quae enim per rerum naturam certa sunt, non morantur obligationem, licet apud nos incerta sint.

Non solum res in stipulatum deduci possunt, sed etiam facta; ut si stipulemur fieri aliquid vel non fieri. Et in huiusmodi stipulationibus optimum erit poenam subicere, ne quantitas stipulationis in incerto sit ac necesse sit actori probare, quid eius intersit. Itaque si quis ut fiat aliquid stipuletur, ita adici poena debet; 'si ita factum non erit, tum poenae nomine decem aureos dare spondes?' Sed si quaedam fieri, quaedam non fieri una eademque conceptione stipuletur, clausula erit huiusmodi adicienda: 'si adversus ea factum erit sive quid ita factum non erit, tunc poenae nomine decem aureos dare spondes?'

Inst. III, 15.

Sed haec quidem verborum obligatio DARI SPONDES? SPONDEO propria civium Romanorum est; ceterae vero iuris gentium sunt, itaque inter omnes homines sive cives Romanos sive peregrinos valent. * * * * At illa verborum obligatio DARI SPONDES? SPONDEO adeo propria civium Romanorum est, ut ne quidem in Graecum sermonem per interpretationem proprie transferri possit, quamvis dicatur a Graeca voce figurata esse.

Unde dicitur uno casu hoc verbo peregrinum quoque obligari posse, veluti si imperator noster principem alicuius peregrini populi de pace ita interroget PACEM FUTURAM SPONDES? vel ipse eodem modo interrogetur. Quod nimium subtiliter dictum est, quia si quid adversus pactionem fiat, non ex stipulatu agitur, sed iure belli res vindicatur.

Gaius, III, 93 and 94.

De Duobus Reis Stipulandi et Promittendi

Et stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondeat 'spondeo'. Ut puta cum duobus separatim stipulantibus ita promissor respondeat 'utrique vestrum dare spondeo'; nam si prius Titio spoponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse. Duo pluresve rei promittendi ita fiunt: 'Maevi, quinque aureos dare spondes? Sei, eosdem quinque aureos dare spondes?' respondeant singuli separatim 'spondeo.'

Ex huiusmodi obligationibus et stipulantibus solidum singulis debetur et promittentes singuli in solidum tenentur. In utraque tamen obligatione una res vertitur; et vel alter debitum accipiendo vel alter solvendo omnium peremit obligationem et omnes liberat. Ex duobus reis promittendi alius pure, alius in diem vel sub condicione obligari potest; nec impedimento erit dies aut condicio, quo minus ab eo qui pure obligatus est petatur.

Inst. III, 16.

De Stipulatione Servorum

Servus ex persona domini ius stipulandi habet. Sed hereditas in plerisque personae defuncti vicem sustinet; ideoque quod servus hereditarius ante aditam hereditatem stipulatur, adquirit hereditati ac per hoc etiam heredi postea facto adquiritur. Sive autem domino sive sibi sive conservo suo sive impersonaliter servus stipuletur, domino adquirit. Idem iuris est et in liberis, qui in potestate patris sunt, ex quibus causis adquirere possunt.

Sed cum factum in stipulatione continebitur, omnimodo persona stipulantis continetur, veluti si servus stipuletur, ut sibi ire agere liceat; ipse enim tantum prohiberi non debet,

non etiam dominus eius. Servus communis stipulando unicuique dominorum pro portione dominii adquirit, nisi si unius eorum iussu aut nominatim cui eorum stipulatus est; tunc enim soli ei adquiritur. Quod servus communis stipulatur, si alteri ex dominis adquiri non potest, solidum alteri adquiritur, veluti si res quam dari stipulatus est unius domini sit.

Inst. III, 17.

De Divisione Stipulationum

Stipulationum aliae iudiciales sunt, aliae praetoriae, aliae conventionales, aliae communes tam praetoriae quam iudiciales. Iudiciales sunt dumtaxat, quae a mero iudicis officio proficiscuntur; veluti de dolo cautio vel de persequendo servo qui in fuga est restituendove pretio. Praetoriae, quae a mero praetoris officio proficiscuntur, veluti damni infecti vel legatorum. Praetorias autem stipulationes sic exaudiri oportet, ut in his contineantur etiam aediliciae; nam et hae ab iurisdictione veniunt.

Conventionales sunt, quae ex conventione utriusque partis concipiuntur, hoc est neque iussu iudicis neque iussu praetoris, sed ex conventione contrahentium. Quarum totidem genera sunt, quot paene dixerim rerum contrahendarum. Communes sunt stipulationes veluti rem salvam fore pupilli; nam et praetor iubet rem salvam fore pupillo caveri et interdum iudex, si aliter expediri haec res non potest; vel de rato stipulatio.

Inst. III, 18.

De Inutilibus Stipulationibus

Omnis res, quae dominio nostro subicitur, in stipulationem deduci potest, sive illa mobilis sive soli sit. At si quis rem, quae in rerum natura non est aut esse non potest, dari stipulatus fuerit, veluti Stichum, qui mortuus sit, quem vivere credebat, aut hippocentaurum, qui esse non possit, inutilis erit stipulatio.

Idem iuris est, si rem sacram aut religiosam, quam humani iuris esse credebat, vel publicam, quae usibus populi perpetuo exposita sit, ut forum vel theatrum, vel liberum hominem, quem servum esse credebat, vel cuius commercium non habuit, vel rem suam dari quis stipuletur. Nec in pendenti erit stipulatio ob id, quod publica res in privatum deduci et ex libero servus fieri potest et commercium adipisci

stipulator potest et res stipulatoris esse desinere potest, sed protinus inutilis est.

Item contra licet initio utiliter res in stipulatum deducta sit, si postea in earum qua causa, de quibus supra dictum est, sine facto promissoris devenerit, extinguitur stipulatio. Ac ne statim ab initio talis stipulatio valebit 'Lucium Titium cum servus erit dare spondes?' et similia; quia natura sui dominio nostro exempta in obligationem deduci nullo modo possunt. Si quis alium daturum facturumve quid spoponderit, non obligabitur, veluti si spondeat Titium quinque aureos daturum. Quodsi effecturum se, ut Titius daret, spoponderit, obligatur.

Si quis alii, quam cuius iuri subiectus sit, stipuletur, nihil agit. Plane solutio etiam in extranei personam conferri potest (veluti si quis ita stipuletur 'mihi aut Seio dare spondes?'), ut obligatio quidem stipulatori adquiratur, solvi tamen Seio etiam invito eo recte possit, ut liberatio ipso iure contingat, sed ille adversus Seium habeat mandati actionem. Quod si quis sibi et alii, cuius iuri subiectus non sit, decem dari aureos stipulatus est, valebit quidem stipulatio; sed utrum totum debetur quod in stipulatione deductum est, an vero pars dimidia, dubitatum est; sed placet non plus quam partem dimidiam ei adquiri. Ei qui tuo iuri subiectus est si stipulatus sis, tibi adquiris, quia vox tua tamquam filii sit, sicuti filii vox tamquam tua intellegitur in his rebus quae tibi adquiri possunt.

Praeterea inutilis est stipulatio, si quis ad ea quae interrogatus erit non responderit, veluti si decem aureos a te dari stipuletur, tu quinque promittas, vel contra; aut si ille pure stipuletur, tu sub condicione promittas, vel contra, si modo scilicet id exprimas, id est si cui sub condicione vel in diem stipulanti tu respondeas, 'praesenti die spondeo.' Nam si hoc solum respondeas, 'promitto,' breviter videris in eandem diem aut condicionem spopondisse; nec enim necesse est in respondendo eadem omnia repeti, quae stipulator expresserit.

Item inutilis est stipulatio, si ab eo stipuleris, qui iuri tuo subiectus est, vel si is a te stipuletur. Sed servus quidem non solum domino suo obligari non potest, sed ne alii quidem ulli; filii vero familias aliis obligari possunt. Mutum neque stipulari neque promittere posse palam est; quod et in surdo receptum est, quia et is qui stipulatur verba promittentis et is qui promittit verba stipulantis audire debet; unde apparet non de eo nos loqui qui tardius exaudit, sed

de eo qui omnino non exaudit. Furiosus nullum negotium gerere potest, quia non intellegit quid agit.

Pupillus omne negotium recte gerit; ut tamen, sicubi tutoris auctoritas necessaria sit, adhibeatur tutor, veluti si ipse obligetur; nam alium sibi obligare etiam sine tutoris auctoritate potest. Sed quod diximus de pupillis, utique de his verum est, qui iam aliquem intellectum habent; nam infans et qui infanti proximus est non multum a furioso distant, quia huius aetatis pupilli nullum intellectum habent. Sed in proximis infanti propter utilitatem eorum benignior iuris interpretatio facta est, ut idem iuris habeant, quod pubertati proximi. Sed qui in parentis potestate est impubes, nec auctore quidem patre obligatur.

Si impossibilis condicio obligationibus adiciatur, nihil valet stipulatio. Impossibilis autem condicio habetur, cui natura impedimento est, quo minus existat, veluti si quis ita dixerit: 'si digito caelum attigero, dare spondes?' At si ita stipuletur, 'si digito caelum non attigero, dare spondes?' pure facta obligatio intellegitur ideoque statim petere potest.

Item verborum obligatio inter absentes concepta inutilis est. Sed cum hoc materiam litium contentiosis hominibus praestabat, forte post tempus tales allegationes opponentibus et non praesentes esse vel se vel adversarios suos contendentibus, ideo nostra constitutio propter celeritatem dirimendarum litium introducta est, quam ad Caesarienses advocatos scripsimus, per quam disposuimus tales scripturas, quae praesto esse partes indicant, omnimodo esse credendas, nisi ipse, qui talibus utitur improbis allegationibus, manifestissimis probationibus vel per scripturam vel per testes idoneos approbaverit in ipso toto die quo conficiebatur instrumentum sese vel adversarium suum in aliis locis esse.

Post mortem suam dari sibi nemo stipulari poterat, non magis quam post eius mortem a quo stipulabatur. Ac ne is, qui in alicuius potestate est, post mortem eius stipulari poterat, quia patris vel domini voce loqui videtur. Sed et si quis ita stipuletur, 'pridie quam moriar' vel 'pridie quam morieris dari?' inutilis erat stipulatio. Sed cum, ut iam dictum est, ex consensu contrahentium stipulationes valent, placuit nobis etiam in hunc iuris articulum necessariam inducere emendationem, ut, sive post mortem sive pridie quam morietur stipulator sive promissor stipulatio concepta est, valeat stipulatio.

Item si quis ita stipulatus erat: 'si navis ex Asia venerit, hodie dare spondes?' inutilis erat stipulatio, quia praepostere concepta est. Sed cum Leo inclitae recordationis in dotibus eandem stipulationem quae praepostera nuncupatur non esse reiciendam existimavit, nobis placuit et huic perfectum robur accommodare, ut non solum in dotibus, sed etiam in omnibus valeat huiusmodi conceptio stipulationis. Ita autem concepta stipulatio, veluti si Titius dicat 'cum moriar, dare spondes?' vel 'cum morieris', et apud veteres utilis erat et nunc valet. Item post mortem alterius recte stipulamur. Si scriptum fuerit in instrumento promississe aliquem, perinde habetur, atque si interrogatione praecedente responsum sit.

Quotiens plures res una stipulatione comprehenduntur, si quidem promissor simpliciter respondeat 'dare spondeo', propter omnes tenetur. Si vero unam ex his vel quasdam daturum se spoponderit, obligatio in his pro quibus spoponderit contrahitur; ex pluribus enim stipulationibus una vel quaedam videntur esse perfectae; singulas enim res stipulari et ad singulas respondere debemus.

Alteri stipulari, ut supra dictum est, nemo potest; inventae sunt enim huiusmodi obligationes ad hoc, ut unusquisque sibi adquirat quod sua interest; ceterum si alii detur, nihil interest stipulatoris. Plane si quis velit hoc facere, poenam stipulari conveniet, ut, nisi ita factum sit, ut comprehensum esset, committetur poenae stipulatio etiam ei cuius nihil interest; poenam enim cum stipulatur quis, non illud inspicitur, quid intersit eius, sed quae sit quantitas in condicione stipulationis. Ergo si quis stipuletur Titio dari, nihil agit, sed si addiderit de poena 'nisi dederis, tot aureos dare spondes?' tunc committitur stipulatio.

Sed et si quis stipuletur alii, cum eius interesset, placuit stipulationem valere. Nam si is, qui pupilli tutelam administrare coeperat, cessit administratione contutori suo et stipulatus est rem pupilli salvam fore, quoniam interest stipulatoris fieri quod stipulatus est, cum obligatus futurus esset pupillo, si male res gesserit, tenet obligatio. Ergo et si quis procuratori suo dari stipulatus sit, stipulatio vires habebit. Et si creditori suo, quod sua interest, ne forte vel poena committatur vel praedia distrahantur quae pignori data erant, valet stipulatio. Versa vice qui alium facturum promisit, videtur in ea esse causa, ut non teneatur, nisi poenam ipse promiserit. Item nemo rem suam futuram in eum casum quo sua fit utiliter stipulatur.

Si de alia re stipulator senserit, de alia promissor, perinde

nulla contrahitur obligatio, ac si ad interrogatum responsum non esset, veluti si hominem Stichum a te stipulatus quis fuerit, tu de Pamphilo senseris, quem Stichum vocari credideris. Quod turpi ex causa promissum est, veluti si quis homicidium vel sacrilegium se facturum promittat, non valet.

Cum quis sub aliqua condicione fuerit stipulatus, licet ante condicionem decesserit, postea existente condicione heres eius agere potest. Idem est et a promissoris parte. Qui hoc anno aut hoc mense dari stipulatus sit, nisi omnibus partibus praeteritis anni vel mensis non recte petet. Si fundum dari stipuleris vel hominem, non poteris continuo agere, nisi tantum spatii praeterierit, quo traditio fieri possit.

Inst. III, 19.

De Fideiussoribus

Pro eo qui promittit solent alii obligari qui fideiussores appellantur, quos homines accipere solent, dum curant, ut diligentius sibi cautum sit. In omnibus autem obligationibus adsumi possunt, id est sive re sive verbis sive litteris sive consensu contractae fuerint. Ac ne illud quidem interest, utrum civilis an naturalis sit obligatio, cui adiciatur fideiussor, adeo quidem, ut pro servo quoque obligetur, sive extraneus sit qui fideiussorem a servo accipiat, sive ipse dominus in id quod sibi naturaliter debetur.

Fideiussor non tantum ipse obligatur, sed etiam heredem obligatum relinquit. Fideiussor et praecedere obligationem et sequi potest. Si plures sint fideiussores, quotquot erunt numero, singuli in solidum tenentur; itaque liberum est creditori a quo velit solidum petere. Sed ex epistula divi Hadriani compellitur creditor a singulis, qui modo solvendo sint litis contestatae tempore, partes petere; ideoque si quis ex fideiussoribus eo tempore solvendo non sit, hoc ceteros onerat. Sed et si ab uno fideiussore creditor totum consecutus fuerit, huius solius detrimentum erit, si is pro quo fideiusssit solvendo non sit; et sibi imputare debet, cum potuerit adiuvari ex epistula divi Hadriani et desiderare, ut pro parte in se detur actio.

Fideiussores ita obligari non possunt, ut plus debeant, quam debet is pro quo obligantur; nam eorum obligatio accessio est principalis obligationis nec plus in accessione esse potest quam in principali re. At ex diverso, ut minus debeant, obligari possunt: itaque si reus decem aureos promiserit, fideiussor in quinque recte obligatur; contra vero

non potest obligari. Item si ille pure promiserit, fideiussor sub condicione promittere potest; contra vero non potest; non solum enim in quantitate, sed etiam in tempore minus et plus intellegitur; plus est enim statim aliquid dare, minus est post tempus dare.

Si quid autem fideiussor pro reo solverit, eius reciperandi causa habet cum eo mandati iudicium. Graece fideiussor plerumque ita accipitur: *τῇ ἐμῇ πίστει κελεύω, λέγω, θέλω* sive *βούλομαι*; sed et si *φημί* dixerit, pro eo erit, ac si dixerit *λέγω*, In stipulationibus fideiussorum sciendum est generaliter hoc accipi, ut, quodcumque scriptum sit quasi actum, videatur etiam actum; ideoque constat, si quis se scripserit fideiussisse, videri omnia sollemniter acta.

Inst. III, 20.

Contracts *Litteris*

Olim scriptura fiebat obligatio, quae nominibus fieri dicebatur, quae nomina hodie non sunt in usu. Plane si quis debere se scripserit, quod numeratum ei non est, de pecunia minime numerata post multum temporis exceptionem opponere non potest; hoc enim saepissime constitutum est. Sic fit, ut et hodie, dum queri non potest, scriptura obligetur; et ex ea nascitur condictio, cessante scilicet verborum obligatione. Multum autem tempus in hac exceptione antea quidem ex principalibus constitutionibus usque ad quinquennium procedebat; sed ne creditores diutius possint suis pecuniis forsitan defraudari, per constitutionem nostram tempus coartatum est, ut ultra biennii metas huiusmodi exceptio minime extendatur.

Inst. III, 21.

Litteris obligatio fit veluti nominibus transscripticiis. Fit autem nomen transscripticium duplici modo, vel a re in personam vel a persona in personam. *A re in personam trans*scriptio fit, veluti si id quod tu ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero. A persona in personam transscriptio fit, veluti si id quod mihi Titius debet tibi id expensum tulero, id est si Titius te delegaverit mihi.

Alia causa est eorum nominum quae arcaria vocantur; in his enim rei, non litterarum obligatio consistit, quippe non aliter valent quam si numerata sit pecunia; numeratio autem pecuniae re facit obligationem. Qua de causa recte dicemus arcaria nomina nullam facere obligationem, sed obligationis factae testimonium praebere.

Unde *non* proprie dicitur arcariis nominibus etiam peregrinos obligari, quia non ipso nomine sed numeratione pecuniae obligantur; quod genus obligationis iuris gentium est.

Transscripticiis vero nominibus an obligentur peregrini merito quaeritur, quia quodammodo iuris civilis est talis obligatio; quod Nervae placuit. Sabino autem et Cassio visum est, si a re in personam fiat nomen transscripticium, etiam peregrinos obligari; si vero a persona in personam, non obligari.

Praeterea litterarum obligatio fieri videtur chirographis et syngraphis, id est si quis debere se aut daturum se scribat; ita scilicet si eo nomine stipulatio non fiat. Quod genus obligationis proprium peregrinorum est.

Gaius, III, 128-134.

Litterarum autem obligatio olim hanc recipiebat definitionem: litterarum obligatio est vetus debitum per verba et scripta solemnia transformatum in novum creditum. Nam si quis centum mihi aureos debebat ex emptione vel locatione vel mutuo vel stipulatione, (multae autem sunt debitorum causae) egoque hunc vellem litteris obligatum mihi reddere, necesse erat solemnia verba dicere et scribere ad eum, quem litteris obligare mihi volebam. Erant autem haec verba, quae et dicebantur et scribebantur: 'Centum aureos, quos mihi ex causa locationis debes, tu ex conventione et confessione litterarum tuarum dabis?' Deinde adscribebantur, ut ab eo qui iam ex locatione obligatus esset, haec verba: 'Ex conventione debeo litterarum mearum.' Et prior obligatio exstinguebatur, nova autem, id est litte-

rarum, nascebatur. Haec vero ex eo quod in scriptis consisteret, adpellationem accepit.

Theophilus: Paraphrase of the Institutes of Justinian, III, 21. Latin version of G. O. Reitz.

Contracts *Consensu*

Consensu fiunt obligationes in emptionibus venditionibus, locationibus conductionibus, societatibus, mandatis. Ideo autem istis modis consensu dicitur obligatio contrahi, quia neque scriptura neque praesentia omnimodo opus est, ac ne dari quicquam necesse est, ut substantiam capiat obligatio, sed sufficit eos qui negotium gerunt consentire. Unde inter absentes quoque talia negotia contrahuntur, veluti per epistulam aut per nuntium. Item in his contractibus alter alteri obligatur in id, quod alterum alteri ex bono et aequo praestare oportet, cum alioquin in verborum obligationibus alius stipuletur, alius promittat.

Inst. III, 22.

Sale

Emptio et venditio contrahitur, simulatque de pretio convenerit, quamvis nondum pretium numeratum sit ac ne arra quidem data fuerit. Nam quod arrae nomine datur, argumentum est emptionis et venditionis contractae. Sed haec quidem de emptionibus et venditionibus, quae sine scriptura consistunt, optinere oportet; nam nihil a nobis in huiusmodi venditionibus innovatum est. In his autem quae scriptura conficiuntur non aliter perfectam esse emptionem et venditionem constituimus, nisi et instrumenta emptionis fuerint conscripta vel manu propria contrahentium, vel ab alio quidem scripta, a contrahente autem subscripta et, si per tabellionem fiunt, nisi et completiones acceperint et fuerint partibus absoluta. Donec enim aliquid ex his deest, et paenitentiae locus est et potest emptor vel venditor sine poena recedere ab emptione. Ita tamen impune recedere eis con-

cedimus, nisi iam arrarum nomine aliquid fuerit datum; hoc etenim subsecuto, sive in scriptis sive sine scriptis venditio celebrata est, is qui recusat adimplere contractum, si quidem emptor est, perdit quod dedit, si vero venditor, duplum restituere compellitur, licet nihil super arris expressum est.

Pretium autem constitui oportet; nam nulla emptio sine pretio esse potest. Sed et certum pretium esse debet. Alioquin si ita inter aliquos convenerit, ut, quanti Titius rem aestimaverit, tanti sit empta; inter veteres satis abundeque hoc dubitabatur, sive constat venditio sive non. Sed nostra decisio ita hoc constituit, ut, quotiens sic composita sit venditio 'quanti ille aestimaverit', sub hac condicione staret contractus, ut, si quidem ipse qui nominatus est pretium definierit, omnimodo secundum eius aestimationem et pretium persolvatur et res tradatur, ut venditio ad effectum perducatur, emptore quidem ex empto actione, venditore autem ex vendito agente. Sin autem ille qui nominatus est vel noluerit vel non potuerit pretium definire, tunc pro nihilo esse venditionem quasi nullo pretio statuto. Quod ius cum in venditionibus nobis placuit, non est absurdum et in locationibus et conductionibus trahere.

Item pretium in numerata pecunia consistere debet. Nam in ceteris rebus an pretium esse possit, veluti homo aut fundus aut toga alterius rei pretium esse possit, valde quaerebatur. Sabinus et Cassius etiam in alia re putant posse pretium consistere; unde illud est, quod vulgo dicebatur per permutationem rerum emptionem et venditionem contrahi eamque speciem emptionis venditionisque vetustissimam esse; argumentoque utebantur Graeco poeta Homero, qui aliqua parte exercitum Achivorum vinum sibi comparasse ait permutatis quibusdam rebus, his verbis: * * * * * * *

Diversae scholae auctores contra sentiebant aliudque esse existimabant permutationem rerum, aliud emptionem et venditionem. Alioquin non posse rem expediri permutatis rebus, quae videatur res venisse et quae pretii nomine data esse; nam utramque videri et venisse et pretii nomine datam esse rationem non pati. Sed Proculi sententia dicen-

tis permutationem propriam esse speciem contractus a venditione separatam merito praevaluit, cum et ipsa aliis Homericis versibus adiuvatur et validioribus rationibus argumentatur. Quod et anteriores divi principes admiserunt et in nostris digestis latius significatur.

Inst. III, 23, Pr., 1 and 2.

Item emptio ac venditio nuda consentientium voluntate contrahitur, permutatio autem ex re tradita initium obligationi praebet; alioquin si res nondum tradita sit, nudo consensu constitui obligationem dicemus, quod in his dumtaxat receptum est, quae nomen suum habent, ut in emptione venditione, conductione, mandato.

Paul. Dig. XIX, 4, 1, 2.

Cum autem emptio et venditio contracta sit (quod effici diximus, simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque si homo mortuus sit vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arboribus turbine deiectis longe minor aut deterior esse coeperit, emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere; quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. Sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet; nam et commodum eius esse debet, cuius periculum est.

Quod si fugerit homo qui veniit aut subreptus fuerit, ita ut neque dolus neque culpa venditoris interveniat, animadvertendum erit, an custodiam eius usque ad traditionem venditor susceperit; sane enim, si susceperit, ad ipsius periculum is casus pertinet; si non susceperit, securus erit. Idem et in ceteris animalibus ceterisque rebus intellegimus. Utique tamen vindicationem rei et condictionem exhibere

debebit emptori, quia sane, qui rem nondum emptori tradidit, adhuc ipse dominus est. Idem est etiam de furti et de damni iniuriae actione.

Emptio tam sub condicione quam pure contrahi potest; sub condicione veluti 'si Stichus intra certum diem tibi placuerit, erit tibi emptus aureis tot.' Loca sacra vel religiosa, item publica, veluti forum, basilicam, frustra quis sciens emit, quas tamen si pro privatis vel profanis deceptus a venditore emerit, habebit actionem ex empto, quod non habere ei liceat, ut consequatur, quod sua interest deceptum eum non esse. Idem iuris est, si hominem liberum pro servo emerit.

Inst. III, 23, 3-5.

Hire

Locatio et conductio proxima est emptioni et venditioni isdemque iuris regulis consistunt. Nam ut emptio et venditio ita contrahitur, si de pretio convenerit, sic etiam locatio et conductio ita contrahi intellegitur, si merces constituta sit. Et competit locatori quidem locati actio, conductori vero conducti.

Et quae supra diximus, si alieno arbitrio pretium permissum fuerit, eadem et de locatione et conductione dicta esse intellegamus, si alieno arbitrio merces permissa fuerit. Qua de causa si fulloni polienda curandave aut sarcinatori sarcienda vestimenta quis dederit nulla statim mercede constituta, sed postea tantum daturus, quantum inter eos convenerit, non proprie locatio et conductio contrahi intellegitur, sed eo nomine praescriptis verbis actio datur.

Praeterea sicut vulgo quaerebatur, an permutatis rebus emptio et venditio contrahitur, ita quaeri solebat de locatione et conductione, si forte rem aliquam tibi utendam sive fruendam quis dederit et invicem a te aliam utendam sive fruendam acceperit. Et placuit non esse locationem et conductionem, sed proprium genus esse contractus. Veluti si, cum unum quis bovem haberet et vicinus eius unum, placu-

erit inter eos, ut per denos dies invicem boves commodarent, ut opus facerent, et apud alterum bos periit; neque locati vel conducti neque commodati competit actio, quia non fuit gratuitum commodatum, verum praescriptis verbis agendum est.

Adeo autem familiaritatem aliquam inter se habere videntur emptio et venditio, item locatio et conductio, ut in quibusdam causis quaeri soleat, utrum emptio et venditio contrahatur, an locatio et conductio; ut ecce de praediis, quae perpetuo quibusdam fruenda traduntur, id est ut, quamdiu pensio sive reditus pro his domino praestetur, neque ipsi conductori neque heredi eius, cuive conductor heresve eius id praedium vendiderit aut donaverit aut dotis nomine dederit aliove quo modo alienaverit, auferre liceat. Sed talis contractus, quia inter veteres dubitabatur et a quibusdam locatio, a quibusdam venditio existimabatur, lex Zenoniana lata est, quae emphyteuseos contractui propriam statuit naturam neque ad locationem neque ad venditionem inclinantem, sed suis pactionibus fulciendam, et si quidem aliquid pactum fuerit, hoc ita optinere, ac si naturalis esset contractus, sin autem nihil de periculo rei fuerit pactum, tunc si quidem totius rei interitus accesserit, ad dominum super hoc redundare periculum, sin particularis, ad emphyteuticarium huiusmodi damnum venire; quo iure utimur.

Inst. III, 24 pr., 1, 2, and 3.

Adeo autem emptio et venditio et locatio et conductio familiaritatem aliquam inter se habere videntur, ut in quibusdam causis quaeri soleat, utrum emptio et venditio contrahatur an locatio et conductio; veluti si qua res in perpetuum locata sit, quod evenit in praediis municipum, quae ea lege locantur, ut quamdiu vectigal praestetur, neque ipsi conductori neque heredi eius praedium auferatur. Sed magis placuit locationem conductionemque esse.

Gaius III, 145.

Quemadmodum in emendo et vendendo naturaliter concessum est quod pluris sit minoris emere, quod minoris sit

pluris vendere et ita invicem se circumscribere, ita in locationibus quoque et conductionibus iuris est.

Paul. Dig. XIX, 2, 22, 3.

Item quaeritur, si cum aurifice Titio convenerit, ut is ex auro suo certi ponderis certaeque formae anulos ei faceret et acciperet verbi gratia aureos decem, utrum emptio et venditio an locatio et conductio contrahi videatur? Cassius ait materiae quidem emptionem venditionemque contrahi, operae autem locationem et conductionem; sed placuit tantum emptionem et venditionem contrahi. Quodsi suum aurum Titius dederit mercede pro opera constituta, dubium non est, quin locatio et conductio sit.

Conductor omnia secundum legem conductionis facere debet et, si quid in lege praetermissum fuerit, id ex bono et aequo debet praestare. Qui pro usu aut vestimentorum aut argenti aut iumenti mercedem aut dedit aut promisit, ab eo custodia talis desideratur, qualem diligentissimus pater familias suis rebus adhibet; quam si praestiterit et aliquo casu rem amiserit, de restituenda ea non tenebitur. Mortuo conductore intra tempora conductionis heres eius eodem iure in conductionem succedit.

Inst. III, 24, 4 and 5.

Partnership

Societatem coire solemus aut totorum bonorum, quam Graeci specialiter κοινοπραξίαν appellant, aut unius alicuius negotiationis, veluti mancipiorum emendorum vendendorumque, aut olei vini frumenti emendi vendendique. Et quidem si nihil de partibus lucri et damni nominatim convenerit, aequales scilicet partes et in lucro et in damno spectantur. Quod si expressae fuerint partes, hae servari debent; nec enim umquam dubium fuit, quin valeat conventio, si duo inter se pacti sunt, ut ad unum quidem duae partes et damni et lucri pertineant, ad alium tertia.

De illa sane conventione quaesitum est, si Titius et Seius inter se pacti sunt, ut ad Titium lucri duae partes pertine-

ant, damni tertia, ad Seium duae partes damni, lucri tertia, an rata debet haberi conventio? Quintus Mucius contra naturam societatis talem pactionem esse existimavit et ob id non esse ratam habendam. Servius Sulpicius, cuius sententia praevaluit, contra sentit, quia saepe quorundam ita pretiosa est opera in societate, ut eos iustum sit meliore condicione in societatem admitti; nam et ita coiri posse societatem non dubitatur, ut alter pecuniam conferat, alter non conferat et tamen lucrum inter eos commune sit, quia saepe opera alicuius pro pecunia valet. Et adeo contra Quinti Mucii sententiam optinuit, ut illud quoque constiterit posse convenire, ut quis lucri partem ferat, damno non teneatur, quod et ipsum Servius convenienter sibi existimavit; quod tamen ita intellegi oportet, ut, si in aliqua re lucrum, in aliqua damnum allatum sit, compensatione facta solum quod superest intellegatur lucri esse. Illud expeditum est, si in una causa pars fuerit expressa, veluti in solo lucro vel in solo damno, in altera vero omissa, in eo quoque quod praetermissum est eandem partem servari.

Manet autem societas eo usque, donec in eodem consensu perseveraverint; at cum aliquis renuntiaverit societati, solvitur societas. Sed plane si quis callide in hoc renuntiaverit societati, ut obveniens aliquod lucrum solus habeat, veluti si totorum bonorum socius, cum ab aliquo heres esset relictus, in hoc renuntiaverit societati, ut hereditatem solus lucrifaceret, cogitur hoc lucrum communicare; si quid vero aliud lucrifaceret, quod non captaverit, ad ipsum solum pertinet; ei vero, cui renuntiatum est, quidquid omnino post renuntiatam societatem adquiritur, soli conceditur.

Solvitur adhuc societas etiam morte socii, quia qui societatem contrahit certam personam sibi eligit. Sed et si consensu plurium societas coita sit, morte unius socii solvitur, etsi plures supersint, nisi si in coeunda societate aliter convenerit. Item si alicuius rei contracta societas sit et finis negotio impositus est, finitur societas. Publicatione quoque distrahi societatem manifestum est, scilicet si universa bona socii publicentur; nam cum in eius locum alius succedit,

pro mortuo habetur. Item si quis ex sociis mole debiti praegravatus bonis suis cesserit et ideo propter publica aut propter privata debita substantia eius veniat, solvitur societas. Sed hoc casu si adhuc consentiant in societatem, nova videtur incipere societas.

Socius socio utrum eo nomine tantum teneatur pro socio actione, si quid dolo commiserit, sicut is qui deponi apud se passus est, an etiam culpae, id est desidiae atque neglegentiae nomine, quaesitum est; praevaluit tamen etiam culpae nomine teneri eum. Culpa autem non ad exactissimam diligentiam dirigenda est; sufficit enim talem diligentiam in communibus rebus adhibere socium, qualem suis rebus adhibere solet; nam qui parum diligentem socium sibi adsumit, de se queri debet.

Inst. III, 25.

Frugibus ex fundo subreptis tam colonus quam dominus furti agere possunt, quia utriusque interest rem persequi.

Paul. Dig. XLVII, 2, 83, 1.

Societatem coire et re et verbis et per nuntium posse nos dubium non est. Dissociamur renuntiatione, morte, capitis minutione, et egestate.

Mod. Dig. XVII, 2, 4.

Mandate

Mandatum contrahitur quinque modis, sive sua tantum gratia aliquis tibi mandet, sive sua et tua, sive aliena tantum, sive sua et aliena, sive tua et aliena. At si tua tantum gratia tibi mandatum sit, supervacuum est mandatum et ob id nulla ex eo obligatio nec mandati inter vos actio nascitur.

Mandantis tantum gratia intervenit mandatum, veluti si quis tibi mandet, ut negotia eius gereres, vel ut fundum ei emeres, vel ut pro eo sponderes. Tua et mandantis, veluti si mandet tibi, ut pecuniam sub usuris crederes ei, qui in

rem ipsius mutuaretur, aut si volente te agere cum eo ex fideiussoria causa mandet tibi, ut cum reo agas periculo mandantis, vel ut ipsius periculo stipuleris ab eo, quem tibi deleget in id quod tibi debuerat.

Aliena autem causa intervenit mandatum, veluti si tibi mandet, ut Titii negotia gereres, vel ut Titio fundum emeres, vel ut pro Titio sponderes. Sua et aliena, veluti si de communibus suis et Titii negotiis gerendis tibi mandet, vel ut sibi et Titio fundum emeres, vel ut pro eo et Titio sponderes. Tua et aliena, veluti si tibi mandet, ut Titio sub usuris crederes. Quodsi ut sine usuris crederes, aliena tantum gratia intercedit mandatum.

Tua gratia intervenit mandatum, veluti si tibi mandet, ut pecunias tuas potius in emptiones praediorum colloces, quam feneres, vel ex diverso ut feneres potius, quam in emptiones praediorum colloces. Cuius generis mandatum magis consilium est quam mandatum et ob id non est obligatorium, quia nemo ex consilio mandati obligatur, etiamsi non expediat ei cui dabitur, cum liberum cuique sit apud se explorare, an expediat consilium.

Itaque si otiosam pecuniam domi te habentem hortatus fuerit aliquis, ut rem aliquam emeres vel eam credas, quamvis non expediet tibi eam emisse vel credidisse, non tamen tibi mandati tenetur. Et adeo haec ita sunt, ut quaesitum sit, an mandati teneatur qui mandavit tibi, ut Titio pecuniam fenerares; sed optinuit Sabini sententia obligatorium esse in hoc casu mandatum, quia non aliter Titio credidisses, quam si tibi mandatum esset.

Illud quoque mandatum non est obligatorium, quod contra bonos mores est, veluti si Titius de furto aut damno faciendo aut de iniuria facienda tibi mandet; licet enim poenam istius facti nomine praestiteris, non tamen ullam habes adversus Titium actionem.

Is qui exsequitur mandatum non debet excedere fines mandati. Ut ecce si quis usque ad centum aureos mandaverit tibi, ut fundum emeres vel ut pro Titio sponderes, neque pluris emere debes neque in ampliorem pecuniam fideiubere, alio-

quin non habebis cum eo mandati actionem; adeo quidem, ut Sabino et Cassio placuerit, etiam si usque ad centum aureos cum eo agere velis, inutiliter te acturum. Diversae scholae auctores recte te usque ad centum aureos acturum existimant; quae sententia sane benignior est. Quod si minoris emeris, habebis scilicet cum eo actionem, quoniam qui mandat, ut sibi centum aureorum fundus emeretur, is utique mandasse intellegitur, ut minoris si posset emeretur.

Recte quoque mandatum contractum, si, dum adhuc integra res sit, revocatum fuerit, evanescit. Item si adhuc integro mandato mors alterutrius interveniat, id est vel eius qui mandaverit, vel eius qui mandatum susceperit, solvitur mandatum. Sed utilitatis causa receptum est, si mortuo eo, qui tibi mandaverit, tu ignorans eum decessisse exsecutus fueras mandatum, posse te agere mandati actione; alioquin iusta et probabilis ignorantia damnum tibi afferat. Et huic simile est, quod placuit, si debitores manumisso dispensatore Titii per ignorantiam liberto solverint, liberari eos; cum alioquin stricta iuris ratione non possent liberari, quia alii solvissent, quam cui solvere deberent.

Mandatum non suscipere liberum est; susceptum autem consummandum aut quam primum renuntiandum est, ut aut per semet ipsum aut per alium eandem rem mandator exsequatur. Nam nisi ita renuntiatur, ut integra causa mandatori reservetur eandem rem explicandi, nihilo minus mandati actio locum habet, nisi si iusta causa intercessit aut non renuntiandi aut intempestive renuntiandi.

Mandatum et in diem differi et sub condicione fieri potest. In summa sciendum est mandatum, nisi gratuitum sit, in aliam formam negotii cadere; nam mercede constituta incipit locatio et conductio esse, et ut generaliter dixerimus, quibus casibus sine mercede suscepto officio mandati aut depositi contrahitur negotium, his casibus interveniente mercede locatio et conductio contrahi intellegitur. Et ideo si fulloni polienda curandave vestimenta dederis aut sarcinatori sarcienda nulla mercede constituta neque promissa, mandati competit actio. Inst. III, 26.

Obligatio mandati consensu contrahentium consistit. Mandatum nisi gratuitum nullum est; nam originem ex officio atque amicitia trahit, contrarium ergo est officio merces; interveniente enim pecunia res ad locationem et conductionem potius respicit.

Paul. Dig. XVII, 1, 1, Pr. and 4.

Si cui fuerit mandatum, ut negotia administraret, hac actione erit conveniendus nec recte negotiorum gestorum cum eo agetur; nec enim ideo est obligatus quod negotia gessit, verum idcirco quod mandatum susceperit; denique tenetur et si non gessisset.

Ulp. Dig. XVII, 1, 6, 1.

Adversus eum, cuius negotia gesta sunt, de pecunia, quam de propriis opibus vel ab aliis mutuo acceptam erogasti, mandati actione pro sorte et usuris potes experiri; de salario quod promisit a praeside provinciae cognitio praebebitur.

Sev. and Ant. Code, IV, 35, 1.

Praeses provinciae de mercedibus ius dicere solet, sed praeceptoribus tantum studiorum liberalium.

Ulp. Dig. L, 13, 1, pr.

Extension of the System
of Civil Contracts by the So-called

INNOMINATE CONTRACTS

In traditionibus rerum quodcumque pactum sit, id valere manifestissimum est.

Gaius, Dig. II, 14, 48.

Labeo libro primo praetoris urbani definit, quod quaedam 'agantur', quaedam 'gerantur', quaedam 'contrahantur'; et actum quidem generale verbum esse, sive verbis sive re quid agatur, ut in stipulatione vel numeratione; con-

tractum autem ultro citroque obligationem, quod Graeci *synallagma* vocant, veluti emptionem venditionem, locationem conductionem, societatem; gestum rem significare sine verbis factam.

Ulp. Dig. L, 16, 19.

Cf. Dig. II, 14, 7, pr. 1 and 2, post. page 72.

Item emptio ac venditio nuda consentientium voluntate contrahitur, permutatio autem ex re tradita initium obligationi praebet; alioquin si res nondum tradita sit, nudo consensu constitui obligationem dicemus, quod in his dumtaxat receptum est, quae nomen suum habent, ut in emptione venditione, conductione, mandato.

Paul. Dig. XIX, 4, 1, 2.

Si tibi polienda sarciendave vestimenta dederim, si quidem gratis hanc operam te suscipiente, mandati est obligatio; si vero mercede data aut constituta, locationis conductionisque negotium geritur. Quod si neque gratis hanc operam susceperis neque protinus aut data aut constituta sit merces, sed eo animo negotium gestum fuerit, ut postea tantum mercedis nomine daretur, quantum inter nos statutum sit, placet quasi de novo negotio in factum dandum esse iudicium, id est praescriptis verbis.

Gaius, Dig. XIX, 5, 22.

Si pecuniam ideo acceperis, ut Capuam eas, deinde parato tibi ad proficiscendum condicio temporis vel valetudinis impedimento fuerit, quo minus proficiscereris, an condici possit, videndum; et cum per te non steterit, potest dici repetitionem cessare; sed cum liceat paenitere ei qui dedit, procul dubio repetetur id quod datum est, nisi forte tua intersit non accepisse te ob hanc causam pecuniam. Nam si ita se res habeat, ut, licet nondum profectus sis, ita tamen rem composueris, ut necesse habeas proficisci, vel sumptus, qui necessarii fuerunt ad profectionem, iam fecisti, ut manifestum sit te plus forte quam accepisti erogasse, condictio

cessabit; sed si minus erogatum sit, condictio locum habebit, ita tamen, ut indemnitas tibi praestetur eius quod expendisti.

Ulp. Dig. XII, 4, 5, pr.

(1) *Do ut des.*

Et si quidem pecuniam dem, ut rem accipiam, emptio et venditio est; sin autem rem do, ut rem accipiam, quia non placet permutationem rerum emptionem esse, dubium non est nasci civilem obligationem, in qua actione id veniet, non ut reddas quod acceperis, sed ut damneris mihi, quanti interest mea illud de quo convenit accipere; vel si meum recipere velim, repetatur quod datum est, quasi ob rem datum re non secuta.

Paul. Dig. XIX, 5, 5, 1.

(2) *Do ut facias.*

At cum do ut facias, si tale sit factum, quod locari solet, puta ut tabulam pingas, pecunia data locatio erit, sicut superiore casu emptio; si rem do, non erit locatio, sed nascetur vel civilis actio in hoc quod mea interest vel ad repetendum condictio. Quod si tale est factum, quod locari non possit, puta ut servum manumittas, * * * * * * condici ei potest vel praescriptis verbis agi.

Paul. Dig. XIX, 5, 5, 2.

(3) *Facio ut des.*

Quod si faciam ut des et posteaquam feci, cessas dare, nulla erit civilis actio, et ideo de dolo dabitur.

Paul. Dig. XIX, 5, 5, 3.

(4) *Facio ut facias.*

Sed si facio ut facias, haec species tractatus plures recipit. Nam si pacti sumus, ut tu a meo debitore Carthagine exigas, ego a tuo Romae, vel ut tu in meo, ego in tuo solo aedificem, et ego aedificavi et tu cessas, in priorem speciem mandatum

quodammodo intervenisse videtur, **** sed tutius erit et in insulis fabricandis et in debitoribus exigendis praescriptis verbis dari actionem, quae actio similis erit mandati actioni, quemadmodum in superioribus casibus locationi et emptioni.

Paul. Dig. XIX, 5, 5, 4.

Cf. Dig. II, 14, 7, 2, post., page 72.

De Condictione Causa Data Causa Non Secuta. Dig. XII, 4.

Item si quis pretii explorandi gratia rem tradat, neque depositum neque commodatum erit, sed non exhibita fide in factum civilis subicitur actio.

Pap. Dig. XIX, 5, 1, 2.

Actio de aestimato proponitur tollendae dubitationis gratia; fuit enim magis dubitatum, cum res aestimata vendenda datur, utrum ex vendito sit actio propter aestimationem, an ex locato, quasi rem vendendam locasse videor, an ex conducto, quasi operas conduxissem, an mandati. Melius itaque visum est hanc actionem proponi; quotiens enim de nomine contractus alicuius ambigeretur, conveniret tamen aliquam actionem dari, dandam aestimatoriam praescriptis verbis actionem; est enim negotium civile gestum et quidem bona fide. Quare omnia et hic locum habent, quae in bonae fidei iudiciis diximus.

Ulp. Dig. XIX, 3, 1, pr.

Itaque cum quid precario rogatum est, non solum hoc interdicto uti possumus, sed etiam praescriptis verbis actione, quae ex bona fide oritur.

Ulp. Dig. XLIII, 26, 2, 2.

PACTS

Iuris gentium conventiones quaedam actiones pariunt, quaedam exceptiones. Quae pariunt actiones, in suo no-

mine non stant, sed transeunt in proprium nomen contractus, ut emptio venditio, locatio conductio, societas, commodatum, depositum et ceteri similes contractus.

Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem; ut puta dedi tibi rem ut mihi aliam dares, dedi ut aliquid facias; hoc *synallagma* esse et hinc nasci civilem obligationem. Et ideo puto recte Iulianum a Mauriciano reprehensum in hoc: dedi tibi Stichum, ut Pamphilum manumittas; manumisisti; evictus est Stichus. Iulianus scribit in factum actionem a praetore dandam; ille ait civilem incerti actionem, id est praescriptis verbis sufficere; esse enim contractum, quod Aristo *synallagma* dicit, unde haec nascitur actio.

Si ob maleficium ne fiat promissum sit, nulla est obligatio ex hac conventione.

Sed cum nulla subest causa, propter conventionem hic constat non posse constitui obligationem; igitur nuda pactio obligationem non parit, sed parit exceptionem. Quin immo interdum format ipsam actionem, ut in bonae fidei iudiciis; solemus enim dicere pacta conventa inesse bonae fidei iudiciis. Sed hoc sic accipiendum est, ut si quidem ex continenti pacta subsecuta sunt, etiam ex parte actoris insint; si ex intervallo, non inerunt, nec valebunt, si agat, ne ex pacto actio nascatur; ut puta post divortium convenit, ne tempore statuto dilationis dos reddatur, sed statim, hoc non valebit, ne ex pacto actio nascatur; idem Marcellus scribit. Et si in tutelae actione convenit, ut maiores quam statutae sunt usurae praestentur, locum non habebit, ne ex pacto nascatur actio; ea enim pacta insunt, quae legem contractui dant, id est quae in ingressu contractus facta sunt. Idem responsum scio a Papiniano, et si post emptionem ex intervallo aliquid extra naturam contractus conveniat, ob hanc causam agi ex empto non posse propter eandem regulam, ne ex pacto actio nascatur. Quod et in omnibus bonae fidei iudiciis erit dicendum. Sed ex parte rei locum habebit pac-

tum, quia solent et ea pacta, quae postea interponuntur, parere exceptiones.

Adeo autem bonae fidei iudiciis pactiones postea factae, quae ex eodem sunt contractu, insunt, ut constet in emptione ceterisque bonae fidei iudiciis re nondum secuta posse abiri ab emptione. Si igitur in totum potest, cur non et pars eius pactione mutari potest? Et haec ita Pomponius libro sexto ad edictum scribit. Quod cum est, etiam ex parte agentis pactio locum habet, ut et ad actionem proficiat nondum re secuta. eadem ratione. Nam si potest tota res tolli, cur non et reformari? Ut quodammodo quasi renovatus contractus videatur; quod non insuptiliter dici potest.

Unde illud aeque non reprobo, quod Pomponius libris lectionum probat, posse in parte recedi pacto ab emptione, quasi repetita partis emptione. Sed cum duo heredes emptori exstiterunt, venditor cum altero pactus est, ut ab emptione recederetur, ait Iulianus valere pactionem et dissolvi pro parte emptionem; quoniam et ex alio contractu paciscendo alter ex heredibus adquirere sibi potuit exceptionem. Utrumque itaque recte placet, et quod Iulianus et quod Pomponius.

Ait praetor: 'Pacta conventa, quae neque dolo malo, neque adversus leges plebis scita senatus consulta decreta edicta principum, neque quo fraus cui eorum fiat, facta erunt, servabo.'

Ulp. Dig. II, 14, 7, pr. 1-7.

Pacta Adiecta

Si venditor habitationem exceperit, ut inquilino liceat habitare, vel colono ut perfrui liceat ad certum tempus, magis esse Servius putabat ex vendito esse actionem; denique Tubero ait, si iste colonus damnum dederit, emptorem ex empto agentem cogere posse venditorem, ut ex locato cum colono experiatur, ut quidquid fuerit consecutus, emptori reddat.

Ulp. Dig. XIX, 1, 13, 30.

Qui fundum vendidit, ut eum certa mercede conductum ipse habeat vel, si vendat, non alii, sed sibi distrahat vel simile aliquid paciscatur; ad complendum id quod pepigerunt ex vendito agere poterit.

Herm. Dig. XVIII, 1, 75.

Insulam hoc modo, ut aliam insulam reficeres, vendidi; respondit nullam esse venditionem, sed civili intentione incerti agendum est.

Ner. Dig. XIX, 5, 6.

Si vendidi tibi insulam certa pecunia et ut aliam insulam meam reficeres, agam ex vendito, ut reficias; si autem hoc solum, ut reficeres eam convenisset, non intellegitur emptio et venditio facta, ut et Neratius scripsit.

Pom. Dig. XIX, 1, 6, 1.

Cf. Dig. II, 14, 7, 5 and 7, ante, page 81, l. 19 and page 82, l. 22.

Pacta Praetoria

Debitum autem ex quacumque causa potest constitui, id est ex quocumque contractu sive certi sive incerti, et si ex causa emptionis quis pretium debeat vel ex causa dotis vel ex causa tutelae vel ex quocumque alio contractu. Debitum autem vel natura sufficit.

Ulp. Dig. XIII, 5, 1, 6 and 7.

Quidam ad creditorem litteras eiusmodi fecit: 'Decem, quae Lucius Titius ex arca tua mutua acceperat, salva ratione usurarum habes penes me, domine.' Respondit secundum ea quae proponerentur actione de constituta pecunia eum teneri.

Scaev. Dig. XIII, 5, 26.

Eo iure utimur, ut quae in praedia urbana inducta illata sunt pignori esse credantur, quasi id tacite convenerit.

Ner. Dig. XX, 2, 4, pr.

In praediis rusticis fructus qui ibi nascuntur tacite intelleguntur pignori esse domino fundi locati, etiamsi nominatim id non convenerit.

Pom. Dig. XX, 2, 7, pr.

Pacta Legitima

Legitima conventio est quae lege aliqua confirmatur; et ideo interdum ex pacto actio nascitur vel tollitur, quotiens lege vel senatus consulto adiuvatur.

Paul. Dig. II, 14, 6.

Donari videtur, quod nullo iure cogente conceditur.

Pap. Dig. L, 17, 82.

Dat aliquis ea mente, ut statim velit accipientis fieri nec ullo casu ad se reverti, et propter nullam aliam causam facit, quam ut liberalitatem et munificentiam exerceat; haec proprie donatio appellatur.

Jul. Dig. XXXIX, 5, 1, pr.

In aedibus alienis habitare gratis donatio videtur; id enim ipsum capere videtur qui habitat, quod mercedem pro habitatione non solvit; potest enim et citra corporis donationem valere donatio, velut si donationis causa cum debitore meo paciscar, ne ante certum tempus ab eo petam.

Pom. Dig. XXXIX, 5, 9, pr.

Pollicitatio donationis inter privatos vim obligationis non inducit.

Frag. Vat. 264a (Girard).

Ceteris etiam donationibus, quae gestis intervenientibus minime sunt insinuatae, sine aliqua distinctione quingentos usque ad solidos valituris.

Code, VIII, 53, 36, 3.

Resque donatas in omnibus supra dictis casibus non solum eos, dum supersunt, sed etiam eorum successores reddere compelli, non tantum his, in quos donatio facta est, sed etiam eorum heredibus.

Code, VIII, 53, 35, 5e.

Ad exactionem dotis, quam semel praestari placuit, qualiacumque sufficere verba censemus, sive scripta fuerint sive non, etiamsi stipulatio in pollicitatione rerum dotalium minime fuerit subsecuta.

Code, V, 11, 6.

Tantoque magis haec firma esse, si piis actibus vel religiosis personis donatio deputata sit (monumentorum observatione in his modis secundum quod specialiter a nobis in huiusmodi casibus praedictum est observanda), ne in praefatis causis ex quibusdam machinationibus non solum indevotus, sed etiam impius donator intellegatur poenasque non solum legitimas, sed etiam caelestes expectet.

Code, VIII, 53, 35, 5d.

NATURAL OBLIGATIONS

Mulier si in ea opinione sit, ut credat se pro dote obligatam, quidquid dotis nomine dederit, non repetit; sublata enim falsa opinione relinquitur pietatis causa, ex qua solutum repeti non potest.

Iul. Dig. XII, 6, 32, 2.

Qui exceptionem perpetuam habet, solutum per errorem repetere potest; sed hoc non est perpetuum. Nam si quidem eius causa exceptio datur cum quo agitur, solutum repetere potest, ut accidit in senatus consulto de intercessionibus; ubi vero in odium eius cui debetur exceptio datur, perperam solutum non repetitur, veluti si filius familias contra Macedonianum mutuam pecuniam acceperit et pater familias factus solverit, non repetit. Mar. Dig. XII, 6, 40, pr.

In bonae fidei autem iudiciis libera potestas permitti videtur iudici ex bono et aequo aestimandi, quantum actori restitui debeat. In quo et illud continetur, ut, si quid invicem actorem praestare oporteat, eo compensato in reliquum is cum quo actum est condemnari debeat. Sed et in strictis iudiciis ex rescripto divi Marci opposita doli mali exceptione compensatio inducebatur. Sed nostra constitutio eas compensationes, quae iure aperto nituntur, latius introduxit, ut actiones ipso iure minuant sive in rem sive personales sive alias quascumque, excepta sola depositi actione, cui aliquid compensationis nomine opponi satis impium esse credidimus, ne sub praetextu compensationis depositarum rerum quis exactione defraudetur.

Inst. IV, 6, 30.

Si constat pecuniam invicem deberi, ipso iure pro soluto compensationem haberi oportet ex eo tempore, ex quo ab utraque parte debetur, utique quoad concurrent quantitates, eiusque solius, quod amplius apud alterum est, usurae debentur, si modo petitio earum subsistit.

Code, 4, 31, 4.

OBLIGATIONS
QUASI EX CONTRACTU

Post genera contractuum enumerata dispiciamus etiam de his obligationibus, quae non proprie quidem ex contractu nasci intelleguntur, sed tamen, quia non ex maleficio substantiam capiunt, quasi ex contractu nasci videntur.

Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones, quae appellantur negotiorum gestorum; sed domino quidem rei gestae adversus eum qui gessit directa competit actio, negotiorum autem gestori contraria. Quas ex nullo contractu proprie nasci manifestum est; quippe ita nascuntur istae actiones, si sine mandato quisque alienis negotiis gerendis se optulerit; ex qua causa ii quorum negotia gesta fuerint etiam ignorantes obligantur.

Idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti nulli demandata negotiorum suorum administratione peregre profecti essent, desererentur negotia; quae sane nemo curaturus esset, si de eo quod quis impendisset nullam habiturus esset actionem. Sicut autem is qui utiliter gesserit negotia habet obligatum dominum negotiorum, ita et contra iste quoque tenetur, ut administrationis rationem reddat. Quo casu ad exactissimam quisque diligentiam compellitur reddere rationem; nec sufficit talem diligentiam adhibere, qualem suis rebus adhibere soleret, si modo alius diligentior commodius administraturus esset negotia.

Tutores quoque, qui tutelae iudicio tenentur, non proprie ex contractu obligati intelleguntur (nullum enim negotium inter tutorem et pupillum contrahitur); sed quia sane non ex maleficio tenentur, quasi ex contractu teneri videntur. Et hoc autem casu mutuae sunt actiones: non tantum enim pupillus cum tutore habet tutelae actionem, sed et ex contrario tutor cum pupillo habet contrariam tutelae, si vel impenderit aliquid in rem pupilli vel pro eo fuerit obligatus aut rem suam creditori eius obligaverit.

Item si inter aliquos communis sit res sine societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo iudicio, quod solus fructus ex ea re perceperit, aut quod socius eius in eam rem necessarias impensas fecerit, non intellegitur proprie ex contractu obligatus esse, quippe nihil inter se contraxerunt; sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur.

Idem iuris est de eo, qui coheredi suo familiae erciscundae iudicio ex his causis obligatus est. Heres quoque legatorum nomine non proprie ex contractu obligatus intellegitur (neque enim cum herede neque cum defuncto ullum negotium legatarius gessisse proprie dici potest); et tamen, quia ex maleficio non est obligatus heres, quasi ex contractu debere intellegitur.

Item is, cui quis per errorem non debitum solvit, quasi ex

contractu debere videtur. Adeo enim non intellegitur proprie ex contractu obligatus, ut, si certiorem rationem sequamur, magis ut supra diximus ex distractu, quam ex contractu possit dici obligatus esse; nam qui solvendi animo pecuniam dat, in hoc dare videtur, ut distrahat potius negotium quam contrahat. Sed tamen proinde is qui accepit obligatur, ac si mutuum illi daretur, et ideo condictione tenetur.

Ex quibusdam tamen causis repeti non potest, quod per errorem non debitum solutum sit. Sic namque definiverunt veteres: ex quibus causis infitiando lis crescit, ex his causis non debitum solutum repeti non posse, veluti ex lege Aquilia, item ex legato. Quod veteres quidem in his legatis locum habere voluerunt, quae certa constituta per damnationem cuicumque fuerant legata; nostra autem constitutio cum unam naturam omnibus legatis et fideicommissis indulsit, huiusmodi augmentum in omnibus legatis et fideicommissis extendi voluit; sed non omnibus legatariis praebuit, sed tantummodo in his legatis et fideicommissis, quae sacrosanctis ecclesiis ceterisque venerabilibus locis, quae religionis vel pietatis intuitu honorificantur, derelicta sunt, quae si indebita solvantur, non repetuntur.

Inst. III, 27.

Si quis absentis negotia gesserit, si quidem ex mandatu, palam est ex contractu nasci inter eos actiones mandati, quibus invicem experiri possunt de eo, quod alterum alteri ex bona fide praestare oportet; si vero sine mandatu, placuit quidem sane eos invicem obligari eoque nomine proditae sunt actiones, quas appellamus negotiorum gestorum, quibus aeque invicem experiri possunt de eo, quod ex bona fide alterum alteri praestare oportet. Sed neque ex contractu neque ex maleficio actiones nascuntur; neque enim is qui gessit cum absente creditur ante contraxisse, neque ullum maleficium est sine mandatu suscipere negotiorum administrationem; longe magis is, cuius negotia gesta sunt, ignorans aut contraxisse aut deliquisse intellegi potest; sed

utilitatis causa receptum est invicem eos obligari.

Ideo autem id ita receptum est, quia plerumque homines eo animo peregre proficiscuntur quasi statim redituri nec ob id ulli curam negotiorum suorum mandant, deinde novis causis intervenientibus ex necessitate diutius absunt; quorum negotia disperire iniquum erat, quae sane disperirent, si vel is, qui obtulisset se negotiis gerundis, nullam habiturus esset actionem de eo, quod utiliter de suo impendisset, vel is, cuius gesta essent, adversus eum, qui invasisset negotia eius, nullo iure agere posset.

Gaius, Dig. XLIV, 7, 5, pr.

Communi dividundo iudicium ideo necessarium fuit, quod pro socio actio magis ad personales invicem praestationes pertinet quam ad communium rerum divisionem. Denique cessat communi dividundo iudicium, si res communis non sit.

Paul. Dig. X, 3, 1.

Nihil autem interest, cum societate an sine societate res inter aliquos communis sit; nam utroque casu locus est communi dividundo iudicio. Cum societate res communis est veluti inter eos, qui pariter eandem rem emerunt; sine societate communis est veluti inter eos, quibus eadem res testamento legata est. In tribus duplicibus iudiciis familiae erciscundae, communi dividundo, finium regundorum quaeritur, quis actor intellegatur, quia par causa omnium videtur; sed magis placuit eum videri actorem, qui ad iudicium provocasset.

Gaius, Dig. X, 3, 2.

Is quoque qui non debitum accepit ab eo qui per errorem solvit re obligatur. Nam proinde ei condici potest 'si paret eum dare oportere', ac si mutuum accepisset. Unde quidam putant pupillum aut mulierem, cui sine tutoris auctoritate non debitum per errorem datum est, non teneri condictione, non magis quam mutui datione. Sed haec species

obligationis non videtur ex contractu consistere, quia is qui solvendi animo dat magis distrahere vult negotium quam contrahere.

Gaius, III, 91. Cf. Inst. III, 14, 1.

5 Fundus dotis nomine traditus si nuptiae insecutae non fuerint, condictione repeti potest; fructus quoque condici poterunt. Idem iuris est de ancilla et partu eius.

Iul. Dig. XII, 4, 7, 1.

NOTES

Part I

DE IUSTITIA ET IURE

PAGE 15, line 1. **constans . . . . tribuens**: 'a steadfast and unvarying determination to render to everyone his due.' For similar definitions of justice, see Plato, Rep. I, 331, e, the definition ascribed to Simonides, 'to restore to each man what is due is just' (Davies and Vaughan's translation), and Cicero, De Fin. V, 23, **"quae animi affectio suum cuique tribuens atque hanc, quam dico, societatem coniunctionis humanae munifice et aeque tuens iustitia dicitur."** In Cicero's definition, as in this passage from the Institutes, justice seems conceived of as a personal quality.

2. **iuris prudentia . . . . notitia**: For an interesting interpretation of this passage, see Pollock's "Oxford Lectures," p. 5. Pollock's view, that **divinarum atque humanarum rerum** means discernment of the distinction between things divine and human, seems confirmed by the words of Ulpian, Dig. I, 1, 1, **Iustitiam namque colimus et boni et aequi notitiam profitemur, aequum ab iniquo separantes, licitum ab illicito discernentes.**

4-14. This paragraph is of the nature of a preface, explaining the scope and purpose of the Institutes as an elementary textbook of Roman Law.

5. **videntur**: supply the subject from **iura**, above.

6. **levi ac simplici**: refers to the Institutes, **diligentissima atque exactissima** to the larger books of the Corpus Juris, e.g., the Digest.

9. **rerum**: 'of details.' **duorum alterum**: 'one of two things;' the first is expressed in **desertorum studiorum**, the second in the clause **serius . . . . perducemus.**

11. **diffidentia**: 'discouragement.'

12. **ad id**: 'to that goal,' i.e., a knowledge of the law.

15. **Iuris**: the word has two chief meanings: (1) the law, in the abstract sense, or a principle of law; (2) right, in the abstract, or a right. Concrete laws are **leges, plebiscita,** etc. See page 16, line 29.

16. **positiones**: 'aspects.'

18. **statum**: 'constitution.'

19. **utilitatem**: 'welfare.'

DE IURE NATURALI ET GENTIUM ET CIVILI

24. This is one of several passages in the Institutes which touch rather superficially upon the philosophy of law. Those rules and customs which are so generally observed that they seem to proceed in-

evitably from the constitution of man are ascribed to the law of nature. Here the subject is treated so broadly as to include the operation of mere animal instinct. Among Roman jurists, Ulpian in particular inclined toward a broad and philosophical treatment of legal subjects. The conception of the law of nature has had a large influence upon the development of legal literature, both among the Romans and in modern times. In general, it may be said that the doctrine has appealed more strongly to continental than to English jurists, many of the latter having preferred a more analytical point of view.

The triple division of private law which is mentioned here and at the end of the preceding paragraph seems traceable to Ulpian. Most Roman jurists, and the Institutes elsewhere, identify **ius gentium** and **ius naturale**. See Moyle, Institutes, p. 100, n.

27. **nos**: i.e., in human relations.

29. **cetera**: i.e., the lower animals.

30. **peritia**: ablative. **censeri**: 'are rated.'

31. **dividitur**: 'is distinguished.' In Roman law, **ius civile** signifies the original law of the city of Rome; **ius gentium** is that portion of Roman law based on the common practice of various states.

PAGE 16, line 8. **Quae . . . sunt**: Indirect questions do not always take the subjunctive in anteclassical and legal Latin.

17. **subauditur**: 'is understood.'

24. **emptio venditio**: the contract of sale; lit., buying and selling; similarly, **locatio conductio** is the contract of hire; lit., letting and hiring—two sides of one transaction.

25. **depositum**: 'deposit.' **mutuum**: a loan for consumption, e.g., of a bushel of wheat.

27. **Constat**: 'consists.'

31. **interrogante**: 'presiding,' lit., putting the question.

34. **constituebat**: Note the tense as compared with page 17, line 4, ff. The senate continued to pass decrees long after the people had lost the right to legislate.

36. **connumeratis**: 'including,' lit., counted in.

PAGE 17, line 2. **lege . . . . lata**: 'after the Hortensian law was passed.' **Legem ferre** is to propose, or pass, a law. The Hortensian law, passed in 287 B. C., provided that resolutions of the plebeian assembly should be legally binding on the whole people.

7. **consuli**: 'be consulted;' present passive infinitive.

8. **quod principi placuit**: 'what the emperor has enacted.'

9. **imperio**: The word is best taken over untranslated.

11. **cognoscens**: 'after examination.'

14. **nec ad exemplum trahuntur**: 'are not used as precedents.'

15. **quod**: accusative; 'a special favor granted to anyone.'

17. **egreditur**: 'go beyond.'

20. **ius honorarium**: the "honorary" law, i.e., that made by officials. The Romans called offices **honores**.

26. **condere**: 'to lay down.'

29. **omnium**: i.e., when they all agreed.

31. **ut est constitutum**: by the emperor Hadrian. Enactments of the emperor were called constitutions. Hadrian's ruling on this point was further developed by Theodosius II, 426 A. D. See Sandars' Justinian, Introd. §§20 and 27; Gaius I, 7; Cod. Theod. I, 4.

32. **Ex non scripto**: continuing the analysis begun on page 16, line 27; 'from an unwritten source.'

33. **diuturni . . . . consensu**: note the two conditions: lapse of time, and the acquiescence of those affected.

PAGE 18, lines 1 and 3. **observarent** and **custodirent** are synonymous terms.

2. **quae . . . . reprehendissent**: 'which they had found written in the laws.'

10. **actiones**: 'suits' at law.

DE IURE PERSONARUM

15. **summa . . . . divisio**: 'the most fundamental distinction.'

17. **eius . . . . cuique**: The order of the pronouns would be reversed in English; we should speak of 'the natural opportunity of each one to do what pleased him.'

19. **constitutio**: 'an institution.'

20. **alieno**: 'another's.'

20 and 22. The derivation of **servus** from **servare** is probably a fanciful one.

26. **ad pretium participandum**: 'to share in the price' with the seller.

28. **enim**: 'for instance.'

DE RERUM DIVISIONE

PAGE 19, line 2. Note that practically the whole treatment of the law of persons has been omitted. **modo**: 'now.'

3. **vel . . . . habentur**: 'are regarded as subject, or not subject to the law of ownership.'

5. **universitatis**: 'belonging to a corporate body.'

6. **pleraque**: 'most things.' **variis ex causis**: 'on different legal grounds.'

7. **ex subjectis**: 'below,' lit., 'from what is subjoined.'

12. **iuris gentium**: 'subject to the **ius gentium**.'

16. **est autem**: supply **publicum**.

17. **iuris gentium**: 'under (the provisions of) the **ius gentium**.' Compare line 12 and note.

19. **ex arboribus ibi natis**: 'to the trees which have grown there.' **onus aliquid . . . reponere**: 'to lighten ones' cargo.'

21. **quorum praediis haerent**: 'on whose estates they border.'

24. **casam**: the fisherman's hut, for temporary shelter, is probably meant.

25. **ex mare deducere**: 'to draw one's nets,' perhaps one's boat, 'from the sea.'

27. **eiusdem iuris**: see line 12, and note.

29. **Universitatis**: a corporation, such as a municipality, or a commercial association; an artificial or juristic person, legally separate and distinct from the members composing it. **civitatibus**: it should be borne in mind that in the ancient world the typical state was a city-state, e.g., Athens, Sparta, Rome. See W. Warde Fowler: The City-State of the Greeks and Romans.

30. **theatra**: in Greco-Roman times, theaters were generally considered among the most essential public buildings.

32. **Nullius . . . . res**: these kinds of **res nullius** are mentioned by way of illustration; the list is not exhaustive; unappropriated objects, such as wild birds or animals, are **res nullius**; see page 20, line 32. **res sacrae et religiosae**: in general, **res sacrae** are things formally consecrated to the service of the gods above; **res religiosae** those abandoned to the gods of the underworld. Gaius, II, 4.

36. **nostram constitutionem**: see Code I, 2, 21. **alienari et obligari**: 'to be alienated and encumbered.'

PAGE 20, line 1. **excepta**: the humanitarian tendency of the later Roman law is noteworthy.

7. **communem locum**: ground owned jointly.

8. **purum**: not before used for burial.

10. **usus fructus**: the right to use and enjoy. **proprietarium**: 'the owner.'

12. **licet . . . . habuerit**: here **licet** is best translated 'although'—although he gives his consent after the burial has occurred.

15. **muri**: the walls of an ancient city were deemed inviolate; not sacred to the service of the gods, but protected by them from the injuries of men. For religious ideas connected with the city in antiquity, see F. de Coulanges: The Ancient City.

17. **sanctos: sancire** means to render inviolable (by a religious act).

To sum up—things therefore are classified as follows:

A. **Res extra patrimonium.**
   1. **Res communes**, e.g., the air, the sea.
   2. **Res publicae**, as rivers and harbors, roads, etc.
   3. **Res universitatis**, e.g., public buildings.
   4. **Res nullius**;
      (a) **Res sacrae**, as temples.
      (b) **Res religiosae**, as burial grounds.
      (c) **Res sanctae**, as city walls.

(d) Unappropriated things.

B. **Res in patrimonio—res singulorum.**

Note that with section 11 (page 20, line 21), the author of the Institutes leaves the classification of things for the present and deals with the

ACQUISITION OF INDIVIDUAL OWNERSHIP

A. Under the **Ius Gentium**
   1. **Occupatio**, sections 12-19 (page 20, line 29 to page 22, line 16).
   2. **Alluvio**, 20-24 (p. 22, l. 16—p. 23, l. 11).
   3. **Specificatio**, 25-28 (p. 23, l. 11—p. 24, l. 29).
   4. **Accessio**, 29-34 (p. 24, l. 29—p. 26, l. 22).
   5. **Bona fide perceptio**, 35-38 (p. 26, l. 22—p. 27, l. 10).
   6. **Thesauri inventio**, 39 (p. 27, ll. 10-18).
   7. **Traditio**, 40-43 (p. 27, l. 19—p. 28, l. 4).
   8. **Nuda voluntas**, 44-48 (p. 28, ll. 4-30).

B. Under the **Ius Civile**
   1. **Usucapio**, Title 6 (p. 32, l. 27—p. 35, l. 16).
   2. **Donatio**, Title 7 (p. 35, l. 17—p. 37, l. 25).
   3. **Testamentum**, Title 10, etc. (p. 42, l. 1 ff).

The discussion of the classification of things is resumed for a time with Title 2, **De Rebus Incorporalibus**, page 28.

22. **dominium**: 'ownership.'

23. **sicut diximus**: see Inst. I, 2, 1, page 16, lines 4-6, and Dig. XLI, 1, 1.

29. **Ferae**: the position of the word shows that it is to be taken with all the nouns.

34. **quisque**: 'one'—a person.

PAGE 21, line 1. **eo usque . . . . donec**: 'as long as.'

8. **Illud**: 'the following.'

10. **tuam**: predicate complement, in agreement with the implied subject, **bestiam**.

11. **persequaris**: subjunctive because **tu** is indefinite, meaning here the hunter.

20. **integra re**: i.e., before he has taken anything.

25. This paragraph deals with animals naturally wild which have been partially or temporarily tamed; in their case the question of ownership hinges upon the **animus revertendi**, the disposition, or intent, to return.

PAGE 22, line 4. **licet**: see note on page 20, line 12.

9. **adeo quidem**: 'to such an extent, in fact.'

11. **reversi fuerint**: a kind of periphrastic future perfect.

12. **cetera**: 'anything else.'

16. **alluvionem**: 'alluvium;' soil gradually deposited by a stream.

18. **latens**: 'imperceptible.'

20. **quoquo**: 'any.'

22. **longiore tempore**: 'for a considerable time.' Duration of time is sometimes expressed by the ablative.

24. **radices egerint**: 'have taken root.'

27. **creditur**: 'is considered.'

29. **ab utraque parte**: 'on either side,' i.e., on both sides.

30. **pro modo latitudinis**: 'in proportion to the width.'

31. **prope ripam**: we should say 'along the bank;' in other words, in proportion to the river frontage of each farm. Dig. XLI, 1, 29.

35. **cuius et fuerat**: in our idiom, 'to whom it had belonged before.'

36. **Quodsi**: 'But if.' **alia parte**: 'elsewhere.'

PAGE 23, line 2. **autem**: used correlatively with **quidem** on page 22, line 37, to mark the contrast.

3. **eius iuris esse incipit**: 'it enters the legal category.' Compare note on **iuris gentium**, page 19, line 17.

7. **causa**: 'case.'

8. **speciem**: 'the identity,' or essential character.

11. **species**: 'article.'

14. **ecce**: 'for example,' lit. 'see.' **spicis**: 'grain-heads.'

17. **emplastrum**: 'a plaster.'

19. **armarium**: 'a cabinet.'

20. **Sabinianorum et Proculianorum**: rival schools of jurists during the first century of the Christian era. Their divergent lines of thought date back to Capito and Labeo, two great jurists of the time of Augustus.

21. **media sententia**: 'an intermediate view.'

24. **qui fecerit**: in that case, the former owner of the materials would be entitled to compensation for them.

25. **conflatum**: 'melted.'

35. **praestavit**: 'has furnished.'

37. **vice**: 'by.' **cedit**: 'becomes part of;' it loses its separate existence and becomes part of the garment by accession.

PAGE 24, line 2. **condictionem**: an **actio in personam** consisting originally of a formal demand for the payment of a certain sum of money or for a specific thing, with thirty days' notice of trial. The thirty days' notice was later dispensed with. Gaius IV, 18; Roby II, 71; Sohm, p. 234; Greenidge, pp. 65 and 198 ff. **sive ipse est**: as subject, understand **fur.**

3. **extinctae res**: 'things which have lost their identity.'

4. **vindicari**: a **vindicatio** was an **actio in rem**, a suit to enforce one's right over a thing against all comers. Compare Gaius IV, 5 and 16.

8. **massas**: 'ingots.'

11. **idem iuris est**: 'the rule of law is the same.'

21. **in sua substantia durant**: 'retain their separate existence.'

26. **competat**: 'would lie,' i.e., would be available. **arbitrio**: 'in the discretion.'

33. **ad exhibendum . . . . agere**: to sue **ad exhibendum** is to sue for the production of a thing in court.

35. **iniunctum**: 'built in.'

PAGE 25, line 6. **ex diverso**: 'conversely.'

14. **exceptionem doli mali**: 'the exception of fraud.' This was a counter plea used by the defendant in a suit, alleging fraud upon the part of the plaintiff. It was originally expressed in the form of a sentence that conditioned the condemnation; i.e., the judex was directed to condemn *unless* certain specified things were proved to be true. In time the **exceptio doli** came to be a general form of counter plea which might be employed in any action, even if fraud were absent. See Poste's Gaius, p. 577-8; Gaius IV, 116a; Sohm, p. 279. **utique**: 'at any rate.'

15. **scienti . . . . potest culpa obici**: 'against one who knows, the counter charge can be brought.'

20. **radices egerit**: see note on p. 22, line 24. Dig. XLI, 1, 26, 1.

22. **ex eo**: understand **tempore.**

24. **fundum**: 'land.'

35. **sua impensa**: 'at his own expense.'

PAGE 26, line 3. **corporis**: 'document.'

12. **in accessionem . . . . cedere**: 'accrue by accession.'

15. **consequens**: 'suitable.'

16. **utilis actio**: the owner could not bring a direct action because he was not in possession, but is granted an action which accomplishes the same result. **Actiones utiles** were given to suit cases and persons outside the limits of the direct action. See Sandars, pp. LXXIII and 428.

25. **percepit**: 'has gathered.' **pro**: 'in consideration of.'

33. **decesserit**: 'has died.'

35. **colono**: **coloni** were a class of non-free persons attached to the soil and entitled to its products on the payment of a fixed rent to the master. The rights of a colonus passed to his heirs at death; those of a usufructuary terminated.

PAGE 27, line 1. **dominii sunt fructuarii**: 'are the property of the fructuary.' Dig. XXII, 1, 28, 1.

4. **rerum**: construe with **natura**; the two words together mean nature, or the universe.

6. **capitum**: 'individuals,' members of the flock. **summittere**: 'to furnish substitutes.'

10. **Thesauros**: treasure is money or other valuables so long hidden and forgotten that at the time of their discovery the owner can not be determined. Dig. XLI, 1, 31, 1.

13. **non data ad hoc opera**: 'with no effort directed to this end.'

19. **traditionem**: 'delivery.'

22. **ratam**: 'valid.'

23. **stipendiaria et tributaria praedia**: stipendiary estates were situated in those provinces which were regarded as the property of the Roman people; tributary estates were located in the provinces which were under the direct control of the emperor. Gaius II, 21.

26. **inter quae nec non Italica praedia**: 'between which, to be sure, and estates in Italy.'

27. **ex nostra constitutione**: formerly, land in Italy had been treated as a **res mancipi**, capable of transfer only by **mancipatio**, a formal process of sale. Gaius I, 119 and 120. Justinian formally abolished **mancipatio**, which had become obsolete, and thereafter land in Italy, like that in the provinces, was transferred by **traditio**.

28. **causa**: the word here seems to mean the legal grounds for a transfer.

29. **venditae vero et traditae**: understand **res**.

32. **expromissore**: an **expromissio** is one's declaration that he is willing to pay another's debt. See Roby II, 46. Sohm, 386.

35. **fidem emptoris secutus fuerit**: 'has accepted the buyer's credit.'

PAGE 28, line 1. **libera . . . . administratio**: 'uncontrolled administration.' Dig. III, 3, 58 and 63.

2. **ex his negotiis**: 'in the course of the business.'

5. **domini**: construe with **voluntas**.

6. **commodavit** etc: in the cases mentioned, delivery has already taken place.

13. **Hoc amplius**: 'further than this.' **collocata**: 'directed.'

15. **missilia**: presents thrown to a crowd.

23. **Alia causa est**: 'The case is different.'

29. **Nec longe discedere**: 'not to differ much.'

DE REBUS INCORPORALIBUS

33. **corporales**: 'corporeal' (not 'corporal'); those which have an objective existence.

PAGE 29, line 2. **in iure consistunt**: "consist in a right" (Sandars); things which exist only in law.

3. **usus fructus**: the right to use a thing and enjoy its fruits; 'a usufruct.'

4. **ad rem pertinet**: 'affect the matter.'

11. **servitutes**: a servitude is a right which one person has in another's property, **ius in re aliena**; it is a right to direct, but incomplete, control. Roby, I, 484. The term **ius in re** should not be confused with **ius in rem**, which signifies complete control over a thing. One who owed a servitude was not obliged to do something, but to allow something to be done, or to refrain from doing something. Dig. VIII,

1, 15, 1. Servitudes are divided into personal and praedial. Dig. VIII, 1, 1. Personal servitudes are those which were owed to particular persons, e.g., a usufruct; though broader in scope, they were terminated by the death of the holder. Praedial servitudes are those which were owed to land, e.g., **iter**; these were narrower in scope, but lasted as long as the land itself. They could, however, be terminated in certain ways. Sohm, 338 and 345.

DE SERVITUTIBUS

14. **Rusticorum praediorum**: in general, **praedia rustica** consisted of land; **praedia urbana** were buildings, even though situated in the country.

15. **Iter**: the right of a landholder to cross his neighbor's land on foot, on horseback, or in a litter. Roby I, 498.

26. **onera**: as when I have the right to rest part of the weight of my floor or roof on my neighbor's wall or pillar.

27. **tignum immittere**: to insert the end of a supporting beam into a neighbor's wall. **stillicidium vel flumen**: the drip or stream of rainwater from a roof. **vel non recipiat**: such servitudes were probably "constituted for the benefit of the owner of a thing that previously had been under some disadvantage." Sandars, p. 121.

PAGE 30, line 3. **vicino . . . ius constituere**: 'to establish a right in favor of one's neighbor.' **pactionibus atque stipulationibus**: two parts of one process. The **pactio** was an informal agreement leading up to a legal obligation; the **stipulatio** was the formal question and answer which made the obligation legally binding. Sohm, 344, 205, n., 382 ff. An earlier way of creating servitudes in Italy was by **in iure cessio**, surrender in court. Roby I, 501.

5. **damnare**: 'to bind.'

DE USU FRUCTU

12. **utendi fruendi = utendi et fruendi. salva rerum substantia**: 'without impairing their substance.'

14. **proprietate**: 'ownership.'

15. **recipit**: 'admits of.'

22. **in universum**: 'wholly.'

23. **abscedente usufructu**: 'through the withdrawal of the usufruct.'

25. **ad proprietatem reverti**: 'restored to the ownership.'

32. **utilitatis causa**: 'for practical reasons.'

34. **ut tamen . . . . caveatur**: 'in such a way, however, that the heir's interest in the matter be properly safeguarded.'

PAGE 31, line 1. **satisdat**: 'gives security.'

10. **capitis deminutionibus**: loss of status, or change of legal personality. There were three grades: **maxima**, the loss of freedom; **media**, loss of citizenship, while freedom was retained, e.g., by removal

to a Latin colony; **minima**, by severance from the agnatic family, as by adoption or marriage. Gaius, I, 159-162; Roby I, 41, 45, 80; Sohm, 178-182. **non utendo per modum**: if the fructuary did not use the usufruct in the way agreed upon within the time fixed by law, his right terminated.

13. **extraneo**: 'to a third party.'

DE USU ET HABITATIONE

29. **ad usum cottidianum**: for his own use from day to day, i.e., he may use, but not sell.

30. **hactenus . . . . ut**: 'as long as.'

35. **hactenus iuris . . . . habitet**: 'is understood to have such a right that he himself may live in it, but can not transfer this right to another.'

PAGE 32, line 12. **neque lacte . . . . utetur**: this rule seemed too strict, and was sometimes modified so as to allow the user a moderate supply of milk for daily use. Dig. VII, 8, 12, 2.

15. **habitatio**: 'the right of residence,' i.e., the right to live in a particular house or on a particular piece of land.

17. **propter rerum utilitatem**: see page 30, line 32, and note.

25. **civili iure**: see page 20, line 24, and the outline under acquisition of ownership, in the notes, page 95.

DE USUCAPIONIBUS ET LONGI TEMPORIS POSSESSIONIBUS

Besides the methods of civil acquisition here mentioned, **usucapio testamentum**, and **donatio**, as many others had been prominent in earlier times: **mancipatio**, or formal transfer by bronze and balance, **in iure cessio**, surrender in court, and **adiudicatio**, judicial award in a suit for division. Roby, I, 423, 425; Sohm, 48, 56 and 310. See pages 48 and 51.

33. **in Italico solo usucapiat**: usucapion, being an institution of the civil law, was originally employed only in Italy; in the provinces, **longi temporis possessio** served a similar purpose. In later times, the distinction between Italian and provincial soil disappeared, and Justinian combined the two institutions. Sohm, 318-320; Morey, 309-311.

PAGE 33, line 1. **resedit**: 'prevailed.'

6. **praesentes**: those living in the same province. **absentes**: those living in different provinces.

9. **iusta causa**: **causa** seems to mean a legal method of gaining ownership or possession, e.g., gift, legacy, or payment of purchase price.

15. **praedicto**: 'aforesaid.'

19. **Quod autem dictum est . . . . non eo pertinet**: 'the statement however . . . . does not mean.'

25. **non facile procedit**: 'it rarely happens.' Compare page 34, ll. 5 and 6.

29. **id aliquando aliter se habet**: 'sometimes the reverse is true.'
30. **defuncto**: 'to the deceased.'
31. **bona fide accipienti**: 'to one who receives it in good faith.'
33. **quippe**: 'obviously because.'
34. **vitium**: 'taint.'

PAGE 34, line 1. **affectu**: 'intention.'

14. **eorum**: construe as dependent upon **cui** below.
20. **bonis vacantibus**: "property of a deceased person who has left no successor." Moyle, p. 230, n. 9.
22. **Pius**: Antoninus Pius.
23. **Severus**: Septimus Severus. **Antoninus**: Caracalla. See Egbert: Latin Inscriptions, 133-136.
24. **vitium**: 'defect of title.'
27. **Error falsae causae usucapionem non parit**: a mistake as to an illegal cause prevents usucapion; i.e., if the cause is actually illegal, it cannot be helped by my erroneously believing that it is legal. A mistake as to a legal cause would not prevent usucapion.
31. **bonorum possessori**: one who had the right, awarded and protected by the praetor, to possess the estate of a deceased person as though he were a legal heir. Roby, I, 236; Sohm, 515-519, and 527-528.
32. **ille**: 'the deceased.'

PAGE 35, line 7. **sive conveniantur sive experiantur**: 'whether they are sued or bring suit themselves.'

8. **intendere**: 'to bring suit.'
9. **hypotheca**: a form of pledge, borrowed from Greek law, whereby the creditor acquired the right of sale on non-payment of the debt. Sohm, 354; Roby, II, 99, 102.
10. **putaverint sibi quasdam competere actiones**: 'have thought themselves entitled to bring certain actions.'
13. **Augustae**: the empress.
19. **mortis causa**: 'depending upon death.'
20. **suspicionem**: 'anticipation.'
21. **ita donat ut**: 'gives with the understanding that.'
23. **eum donationis paenituisset**: for the construction with paenitet, see the Latin grammar.
24. **ad exemplum legatorum redactae sunt**: 'have been given the character of legacies.'
25. **per omnia**: this statement is qualified four lines below.
27. **instar**: equivalent to **exemplum**, above. **eam**: i.e., **donatio mortis causa.** **causae**: see note on page 33, line 9.
28. **alii et aliud genus eam retrahebant**: "some classified it under one head, and some under another.'
29. **connumeretur**: 'be assimilated.'
30. **procedat**: 'be reckoned.'

33. **apud Homerum**: the passage referred to is found in the Odyssey, XVII, 78-83, and runs as follows:

"Piraeus, what the issue yet may be
We have no certain knowledge. If perchance
The Suitors overbold within my halls
Slay me by stealth and part my father's goods
Amongst them, I would liefer thou shouldst hold
The dear possession of these precious things
Than any of *them*. But if I bring to pass
Their doom and slaughter, these into my house
Thou well couldst bring, rejoicing in my joy."

Translation by J. G. Cordery.

PAGE 36, line 2. **temere**: 'at will.'

5. **ad exemplum venditionis**: 'after the manner of sale.'

8. **cum retro**: 'whereas previously.'

9. **dispositiones**: 'enactments.' **insinuari eas actis intervenientibus volebant**: 'required them to be entered in the official records.'

13. **penitus insinuationem fieri minime desiderant**: 'do not require registration at all;' i.e., without regard to the amount involved.

15. **ad uberiorem exitum donationum**: 'to give greater effect to gifts.'

18. **existant**: 'prove.'

32. **si quid tale evenit**: i.e., if the dowry was increased after marriage.

37. **plenissimo fini tradere sanctiones**: 'to amend the law as fully as possible.'

PAGE 37, line 9. **per ius adcrescendi**: 'through the right of accrual.'

11. **imposuit**: 'has conferred.'

15. **invidiae plenum**: 'quite unfair.'

19. **cum effectu procedente**: 'continuing in effect.'

22. **stabilitate**: 'confirmation.' **indemni**: 'saved from loss.'

24. **quod nos definivimus**: Code VII, 7, 1, 5.

QUIBUS ALIENARE LICET VEL NON

32. **in soli tantummodo rebus**: 'in the case of immovable property only.'

34. **hypothecas**: see note on page 35, line 9.

35. **volente**: construe with **muliere**, understood.

PAGE 38, line 2. **obligatio**: 'encumbrance.'

7. **intellegitur**: the subject is **creditor.**

8. **contractus**: genitive case.

10. **temere**: 'too easily.'

12. **consultum est**: 'the matter has been taken care of.'

13. **distractio**: 'sale.'

18. **mutuam pecuniam**: 'a money loan.'

20. **vindicare**: see note on page 24, line 4.

22. **condici**: see note on **condictionem**, page 24, line 2. **ad exhibendum**: see note on page 24, line 33.

23. **omnes res pupillo . . . . dari possunt**: on the theory that the pupil is at liberty to improve his condition, but may not make it worse.

27. **evidentissima ratione**: 'with the plainest reasoning.'

28. **Caesarienses**: 'of Caesarea.' There were several places of that name; probably the one in Palestine is meant.

30. **ita . . . . ut**: 'on condition that.' **debitorem pupillarem**: one who owes a pupil.

31. **sententia iudicialis**: an order of a judex. **sine omni damno celebrata**: 'issued without any cost.'

32. **quo subsecuto**: 'in accordance with this.'

37. **exceptionem**: see note on page 25, line 14. **summoveri**: 'be defeated.'

PER QUAS PERSONAS NOBIS ADQUIRITUR

PAGE 39, line 12. **in potestate**: a person legally under the control of another person was said to be **in potestate**; one independent of such control was said to be **sui iuris.**

13. **usum fructum**: see note on page 29, line 3.

18. **castrensibus peculiis**: under the Republic, a son could own no property during the lifetime of his father; whatever the son acquired became the property of his father. From the time of Augustus, a son was allowed ownership of whatever he acquired in military service, and this was called **peculium castrense.** Leage, 79; Roby I, 66; Muirhead, 311; Sohm, 484.

22. **applicare**: 'to dispose of.'

25. **ei obveniat**: 'comes to him,' i.e., to a son.

27. **occasione**: 'good fortune.'

31. **luctuosum ei procedat**: 'be a source of vexation to him.'

34. **ex rebus**: join with **partem tertiam. quae adquisitionem effugiunt**: 'which are not subject to acquisition' (for the father).

PAGE 40, line 3. **pro parte**: 'in part.'

15. **alias nisi iussu vestro**: 'except by your command;' on the principle that the slave could not make his master's condition worse. An inheritance might entail a net loss in some cases.

21. **possessio**: the slave was not deemed capable of the intent which was requisite for legal possession.

25. **ex re vestra**: 'from your property.'

29. **domino proprietatis**: 'for the owner.'

PAGE 41, line 6. **in utriusque persona**: in the case both of slaves and of freemen held in good faith as slaves.

13. **hoc est quod dicitur**: 'this is the meaning of the saying.'

14. **excepto eo quod**: 'with the exception that.'

22. **fideicommissorum**: 'testamentary trusts.' A **fideicommissum** was a request addressed to the heir to convey part or all of the inheritance to a third party not legally qualified to be an heir or a legatee. Muirhead, 319-320; Sohm, 570; Roby I, 356.

24. **per universitatem**: 'by universal succession,' i.e., a succession to the liabilities as well as to the rights of the deceased, so continuing his legal personality.

26. **si quem adrogaveritis**: 'if you have adopted a **paterfamilias**.' Muirhead, 27; Sohm, 479; Roby I, 60.

27. **libertatum conservandarum causa**: 'to defend the liberty of persons freed (by will).'

32. **de ordinandis testamentis**: the legal method of making wills.

DE TESTAMENTIS ORDINANDIS

PAGE 42, line 2. **testatio mentis**: 'an attestation of purpose.' The definition is better than the etymology; **testamentum** is not derived from **mens**, but **-mentum** is an instrumental suffix employed in noun formation.

5. **calatis comitiis**: at an assembly duly called.

7. **procinctum**: literally, girt up, ready for action.

8. **per aes et libram**: 'by bronze and balance,' the characteristic civil law method of transfer of **res mancipi**. Gaius I, 119.

10. **libripende**: 'a balance-holder,' symbolic of justice.

11. **familiae emptor**: the fictitious purchaser of the household, i.e., of the entire estate.

16. **praedicta . . . . nomina**: 'the aforesaid kinds.'

18. **iure . . . honorario**: 'by the honorary law;' that made by officials, e.g., the praetor.

22. **in unam consonantiam**: 'into one harmonious whole.'

26. **signacula**: 'the seals,' (of the witnesses).

28. **eorum praesentia uno contextu**: 'the continuous presence of them all.'

29. **testamenti celebrandi gratia**: 'to make the execution of the will legally binding.'

35. **exprimatur**: 'should be written.'

PAGE 43, line 4. **sculptura**: the carved device on the seal.

7. **testamenti factio**: 'the legal right to make a will.'

9. **cui bonis interdictum est**: 'one from whom the control of his property has been taken by interdict,' i.e., by summary order of a magistrate. **iubent**: 'declare.'

15. **sic . . . . atque si**: 'just as if.'

18. **ei status quaestionem moveat**: 'to raise a question of his status.'

22. **alieno negotio**: 'to the business of an outsider.'

24. **post missionem**: 'after his discharge from the service.'

26. **reprobatum**: 'rejected.'

28. **scriptus**: 'named in the will.'

32. **creditur . . . . agi**: since the **familiae emptor** had now been superseded by the heir.

33. **Licet**: 'Whereas.'

37. **licet**: 'although.'

PAGE 44, line 1. **hoc iure . . . . suadebant**: the practice is criticized in Gaius II, 108.

2. **tamen**: correlative with **licet** in line 33, page 43.

10. **fideicommissariis**: persons for whose benefit **fideicommissa** were made. See note on page 41, line 22. The person of whom such a request was made was called **fiduciarius.** Morey, 335; Sandars, 249-251. **iuris successores**: 'legal successors.' By the Roman law of inheritance, the heir succeeded to the entire legal personality of the deceased.

18. **pluribus codicibus**: 'in several copies.'

19. **optinentem . . . . observationem**: 'regular form.'

21. **contestationem**: 'proof.'

22. **quas humanis necessitatibus imminent**: 'which are incident to the emergencies of life.'

DE MILITARI TESTAMENTO

31. **Supra dicta**: 'The aforesaid.'

PAGE 45, line 1. **cum**: 'when.'

4. **ex voluntate eius**: 'by virtue of his intention.'

6. **degunt**: 'live.' The word is used absolutely in this sense in post-Augustan Latin.

11. **Plane**: 'Now.'

17. **quaeritur**: 'suit is brought.' **ad hoc**: 'expressly.'

24. **nec ullorum magis interest**: 'nor is it more to the interest of anyone.'

26. **existerent**: 'would be found.'

28. **cui visum sit**: 'to anyone they please.'

32. **adhuc militantes**: 'those still in the service.'

37. **heredi adscripta**: 'imposed upon the heir.'

PAGE 46, line 5. **alias**: 'otherwise.'

7. **in adrogationem**: see note on page 41, line 27.

10. **capitis deminutione**: see note on page 31, line 10.

11. **castrensis peculii**: see note on page 39, line 18.

13. **quasi castrensia . . . . peculia**: under Constantine, a son was permitted to own whatever he acquired while in public office, and this was called his quasi-military peculium. Leage, 79; Sohm, 484.

Part II

PRELIMINARY DEFINITIONS

PAGE 47, line 5. **aliquid . . . . praestandum**: 'to be responsible for something.'

8. **Post litem contestatam**: after the issue has been formally joined in court.

11. **bona**: 'privileges.'

IUS IURANDUM

21. **legibus**: 'terms.'

22. **Tum**: on the occasion of an early treaty of peace between Rome and Alba Longa. **vetustior . . . . memoria**: ancient history even in Livy's day; possibly from an old temple record.

23. **Fetialis**: a priest who officiates at the making of treaties.

24. **patre patrato**: the **pater patratus** is a representative of the college of priests who ratifies a treaty with religious rites. Cf. page 48, line 4.

25. **ferire**: the treaty is solemnized by 'striking' the victim sacrificed. Cf. page 48, line 14. **sagmina**: the sacred herbs which rendered the person of the fetial inviolable.

28. **Quiritium**: said to be derived from **quiris**, a spear. The Quirites were the old Roman military aristocracy. **vasa**: utensils belonging to the fetials.

PAGE 48, line 1. **fraude**: 'evil.'

3. **verbena**: a 'sacred branch' of laurel, olive, or myrtle.

6. **carmine**: 'ritual.'

8. **Legibus**: 'Formulae.'

10. **tabulis cerave**: 'tablets of wax.'

13. **defexit**: archaic form equivalent to **defecerit. Diespiter**: an alternative name for Jupiter. "God of Day" is "Father Jupiter."

14. **ferito . . . . feriam . . . . ferito**: note the repetition of the word 'strike' as emphasizing the dramatic moment in the ceremony.

16. **percussit**: from **per** and **quatio**, 'to strike or pierce through.' Cf. Cicero, De Nat. Deorum, III, 84, **Juppiter fulmine percussit.** This verb may have been used here simply for a stylistic reason, to avoid the further repetition of the word **ferit.** There is the added grammatical reason that Livy here needs a past tense and **ferire** has no perfect form. Nevertheless the use of a word that means 'to pierce' rather than one that means simply 'to strike' may not be without significance at this point, especially as we find the present form **percutit** in Gaius, I, 119. (See **Mancipatio**, page 48). In this latter instance Gaius has used **percutit** instead of **ferit** when there was no stylistic or grammatical reason for preferring one to the other. It seems a plausible inference that Gaius must have found **percutit** in the original

record, and that the author had a good institutional reason for preferring the word which described most graphically the act of striking a piercing or rending blow.

21. **Dispiter**: cf. **Diespiter,** page 48, line 13, and note.

NEXUM

25. **nexum**: derived from **nectere**, 'to bind.' Translate 'obligation.' **mancipiumque**: from **manus** and **capio,** 'a seizing with the hand;' hendiadys, 'incur an obligation by seizing with the hand.' **nuncupassit**: an archaic form of the future perfect indicative.

28. **Manilius**: probably consul 149 B. C. **per libram et aes**: 'by the balance and the bronze ingot.' Cf. page 49, line 6.

29. **Mucius**: probably Quintus Mucius Scaevola, consul 95 B. C.

30. **praeter**: 'in addition to.'

MANCIPATIO

33. **imaginaria**: 'a symbolic form of.'

PAGE 49, line 1. **quinque testibus**: said to be representative of the five classes into which Servius Tullius divided the primitive Roman people.

2. **libram aeneam**: supposed to be symbolic of justice.

3. **libripens**: the officer of justice. **is qui mancipio accipit**: 'the vendee.'

4. **hunc hominem**: the slave who is sold. **ex iure Quiritium**: the Quirites were the primitive Roman citizens.

6. **percutit**: 'strikes.' Note that Gaius here uses the word which means a piercing, riving blow with a weapon, where one might naturally expect **ferit**. This passage from Gaius has intrinsic marks of derivation from a very early source. The word **percutit** was probably used in this source in describing the act which validated the agreement, as we saw in the sacrifice of the pig described by Livy. Cf. page 48, line 14. **a quo mancipio accipit**: 'the vendor.'

MANDATUM

12. **fuas**: an archaic form for **sis.**

13. **Hoc age tu**: an imperative with the force of a condition. 'If you do this,' i.e., shake hands.

16. **Mandavisti satis**: Paulus says that the mandate (giving of the hand) was indicative of a friendly service. Cf. Dig. XVII, 1, 1, 4.

SPONSIO

22. **Verrius**: time of Augustus. **sponte sua**: probably an incorrect derivation.

24. σπονδάς; 'libations' of wine, the blood of the grape, poured upon the ground. The word is derived from σπένδειν, 'to pour out.' It seems not improbable that the spilling of the wine was symbolic of

the pouring out of the blood that followed the sacrificial stroke. Cf. page 48, line 16.

PAGE 50, line 3. **a Graeca voce figurata**: 'derived from the Greek.'

STIPULATIO

7. **sponsus**: genitive.

10. **moris**: genitive; 'it was a custom with the ancients.'

11. **stipulari et spondere**: these two words describe the question and the answer of the betrothal; 'give a stipulation and a promise.' **futuras**: supply **esse.**

13. **testimonio . . . quod**: 'is shown by the fact that.'

16. **stiparetur**: 'stamped.'

17. **stipem**: the nominative of this word does not occur, though Varro apparently assumes that it is **stips.** **aes**: 'coined money.'

20. **Stipes**: 'a stake.' Cf. page 57, line 3. Justinian there says that **stipulatio** is derived from **stipulum,** which possibly is derived from **stipes.**

22. **sibi**: 'to one another.' **stipulam**: 'a rod' or reed.'

The usage here described of breaking a reed and afterwards uniting the broken ends "is not unknown, but there does not appear to be any extrinsic evidence in support of it." Compare the indenture in English law. See Hunter: Roman Law, p. 460.

25. **Isidore,** of Seville: a noted etymologist of the seventh century of the Christian era.

FESTUCA

27. **Si in rem agebatur**: 'If the action is **in rem.**'

28. **in iure**: 'before the court.'

29. **festucam**: 'reed.'

PAGE 51, line 1. **secundum suam causam**: 'for a proper compensation.'

2. **vindictam**: 'rod.'

5. **mittite ambo hominem**: 'both let go the man.'

7. **ius feci**: 'I asserted my right.'

THE NATURE AND CLASSES OF OBLIGATIONS

PAGE 52, line 2. **juris vinculum**: 'a legal bond.' This idea of a bond, from **ligare,** 'to tie,' is fundamental in the Roman conception of obligations. An obligation is a legal tie connecting two particular persons, the one who owes the obligation, and the one to whom it is owed.

3. **alicuius solvendae rei**: 'of rendering something.' Paulus says (Dig. XLIV, 7, 3) "Obligationum substantia non in eo consistit, ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis obstringat ad dandum aliquid vel faciendum vel praestandum." 'The essence of obligations does not consist in this, that it makes some

object or some servitude ours, but that it binds another person to give something to us, to do something for us, or to recompense us for something.' Cf. Morey, p. 344.

5. **summa divisio in duo genera deducitur**: 'the primary division is into two classes.' Cf. line 9 below.

9. **honorariae**: cf. note on page 17, line 20.

10. **quasi**: the word has been carried over into English.

13. **re**: the word means 'by a thing.' Contracts of delivery of this kind are sometimes called real contracts, with reference to the derivation of the word real from **res**. A real contract depends for its validity upon the delivery of a thing.

14. **verbis . . . . consensu**: the verbal contract depends on a set form of spoken words; the literal, on formal entry in an account book; the consensual, on informal agreement of the parties.

OBLIGATIONS *EX CONTRACTU*
CONTRACTS *RE**
MUTUUM

*Note: See page 49, line 6: **deinde aere percutit libram idque aes dat . . . quasi pretii loco**: Gaius I, 119. This passage suggests the possibility of a connection between the striking of the victim in the old sacrificial contract (pages 47-48), indicated by **percutit**, and the delivery of a thing (**aes dat**), which is the essence of the classical contract **re**.

22. **veluti**: 'for instance.' **mutui datione**: 'by the giving of a loan for consumption,' as distinguished from a loan for use. **Mutui obligatio**: the genitive is subjective; 'the obligation arising from a **mutuum**.'

24. **constant**: 'are determined.'

26. **in hoc . . . . ut**: 'to the end that.'

30. **condictio**: see note on page 24, line 2.

31. **non debitum**: 'a sum not owed him.'

34. **si . . . . oportere**: words from the formula granted by the praetor.

PAGE 53, line 3. **consistere**: 'to result.'

4. **distrahere**: 'to discharge.'

10. **condici non posse**: 'can not be sued for in a personal action.'

13. **re**: the contract **re**, created by the delivery of a fungible thing, (that is, a thing to be used up), gives rise to an obligation to give back a like quantity of the same kind and quality.

21. **nec depositum nec mutuum est**: 'it is neither a deposit nor a loan (for consumption)'; because it is impossible to give back a thing of the same kind and quality as the thing received.

27. **tibi adquiritur obligatio**: a right to sue is acquired by B because A has actually delivered to C what both A and C agree is the money of B; hence B has an action to recover his money.

PAGE 54, line 1. **meos nummos**: although it was not actually my money that you received, nevertheless it was money paid to you at my request. An agent may transfer money for the principal.

COMMODATUM

6. **distat**: 'is in a different situation.'
17. **alioquin**: 'however.'
23. **locatus**: supply **esse**; 'to have been hired.'
29. **utendi**: 'of giving for use.' Paconius uses a broader term, including the giving of a movable or an immovable thing.

PAGE 55, line 1. **habitationem**: 'a dwelling.'
5. **beneficium**: the one who confers a *gratuitous* benefit naturally has the right to prescribe the original terms of the loan.
6. **retro agere**: 'to go back' on the arrangement.
9. **dandum accipiendumque**: apparently the giver and receiver; some editors read **dantem accipientemque.** **pugillares**: small tablets that could be held in the hand.
10. **caveret**: 'might give security.'
17. **continet**: 'contemplates.'
19. **culpam praestandam**: 'one must be liable for negligence.'
24. **depositi**: see note on page 52, line 21, **mutui obligatio.**
29. **facilitati**: 'slackness.' Compare our expression, "an easy mark."

PAGE 56, line 1. **dumtaxat**: 'at least.'
14. **magnam neglegentiam**: 'gross negligence.' **crimine**: 'offense.'

PIGNUS

23. **quam si praestiterit**: 'and if he has shown that.'
24. **nec impediri creditum petere**: 'and is not hampered in suing for what he has loaned.'
26. **ea**: those qualities, or that degree of care. **praestare**: 'to manifest.'

PAGE 57, line 3. **ex stipulatu**: supply **actio.**
6. **spondes**: 'do you bind yourself?'
7. **fidepromittis**: 'do you promise on your guarantee?'
10. **intellectum**: 'an understanding.'
14. **sollemnia**: 'formal.'
15. **Leoniana**: 'of the emperor Leo.'
16. **consonantem**: 'common.'
18. **licet**: 'although.'
19. **pure**: 'absolutely.' **in diem**: 'for a future date.'
22. **primis**: 'next.'
24. **peti . . . . non potest**: 'suit can not be brought for it.'
30. **perpetuatur**: 'becomes permanent.'
31. **ad tempus deberi non potest**: the idea is that nothing but its payment can terminate a debt.

32. **submovebitur**: 'will be defeated.'

35. **committatur**: 'becomes effective.'

PAGE 58, line 1. **dari**: this word, like **debitum iri** in the next line, is used impersonally.

7. **iniectum**: 'implied.' **utatur**: 'requires.'

10. **repromissio**: the promise given in reply would be incapable of fulfilment.

12. **statim infirmant obligationem**: 'fail at the outset to create an obligation.'

16. **per rerum naturam**: 'in reality.'

17. **apud nos**: 'to us.'

18. **in stipulatum deduci**: 'be made the subject of a stipulation.'

21. **actori probare quid eius intersit**: 'for the plaintiff to show what his interest is.' **interest** and **refert** are construed with the genitive of the person interested.

27. **sive quid ita factum non erit**: 'if anything specified is omitted.'

35. **per interpretationem**: 'by translation.'

36. **figurata**: 'formed.'

PAGE 59, line 3. **SPONDES**: compare this section from Gaius with Livy I, 24, 4-9, quoted on page 47.

4. **subtiliter**: translate 'an academic distinction.' As a matter of fact, this passage is very significant as showing the probable connection of the sacrificial ceremony with its pouring out of blood and the later **sponsio** derived from the Greek word σπένδειν, 'to pour,' In the sacrificial ceremony accompanying the agreement of the treaty, the power of the gods is invoked as a sanction; in the **sponsio** the sanction is the power of the legally organized state. The pouring out of the blood is however preserved symbolically in the significance of the words **spondesne, spondeo,** whose meaning gives so much trouble.

6. **iure belli**: 'by the law of war.'

DE DUOBUS REIS STIPULANDI ET PROMITTENDI

9. **rei**: 'parties.'

10. **post omnium interrogationem**: 'after they have all asked the question.'

14. **alia atque alia erit obligatio**: 'there will be two separate obligations.'

19. **solidum**: 'the whole debt.' For solidary obligation compare Sohm, 361, ff.

21. **una res vertitur**: 'but one thing is dealt with,' that is, but one debt is created. **alter . . . . alter**: the words do not have their usual correlative use; in both cases, **alter** means one, or either, of the joint parties.

DE STIPULATIONE SERVORUM

29. **ex persona domini**: 'from the legal capacity of his master.'

30. **in plerisque**: 'in most cases.' **vicem sustinet**: 'represents.' Sohm, 512-514.

31. **servus hereditarius**: 'a slave belonging to an inheritance.

32. **heredi postea facto**: 'for him who afterward becomes heir.'

35. **ex quibus causis**: 'in cases in which.'

37. **factum**: 'an act;' here, permission to do some definite thing.

38. **persona**: 'person,' in the usual English sense.

39. **ire agere**: 'to pass, or to drive' across another's land. See page 29, lines 14-19, and notes. Compare Dig. XLV, 3, 17.

PAGE 60, line 1. **servus communis**: 'a slave held by co-owners.'

5. **solidum**: 'as a whole.'

6. **unius domini sit**: 'is (already) property of one of his owners.'

DE DIVISIONE STIPULATIONUM

11. **conventionales**: 'conventional,' that is, by agreement.

12. **dumtaxat**: 'simply.' **a mero . . . . officio**: 'wholly from the office.'

13. **dolo cautio**: 'security against fraud.' Where suit was brought for the recovery of an object, the defendant was sometimes required at the outset to give security that he would not injure the property in the meantime.

16. **damni infecti**: injury anticipated, but not yet done, against which one might be required to give security, **cautio damni infecti.**

17. **exaudiri**: 'to be construed.'

26. **de rato**: given by an agent to guarantee that his acts will be ratified by his principal.

DE INUTILIBUS STIPULATIONIBUS

32. **Stichum**: a slave.

35. **sacram aut religiosam**: see page 19, line 32 to page 20, line 14.

36. **publicam**: see page 19, lines 14-28.

38. **commercium**: the legal right to traffic.

39. **in pendenti**: 'in suspense.'

PAGE 61, line 6. **ne statim ab initio . . . valebit**: 'will be void even from the outset.'

17. **liberatio ipso iure contingat**: 'by strict law the obligation is discharged.'

30. **si modo scilicet id exprimas**: 'provided, of course, you express that,' that is, the disagreement.

44. **tardius**: 'imperfectly.'

PAGE 62, line 3. **ut tamen**: 'provided.'

5. **ipse**: the pupil.

6. **utique**: 'only.'

8. **infans**: children under seven were considered **infantes.** See Moyle's note, p. 416.

12. **pubertati**: according to Justinian, this was considered to begin at the age of fourteen in boys, and twelve in girls. Inst. I, 22, pr.

15. **cui natura impedimento . . . . existat**: one which nature prevents from coming to pass.

21. **absentes**: not both present when the agreement was made.

27. **tales scripturas, quae . . . . . indicant**: 'such writings as show.'

34. **poterat**: note the tense.

PAGE 63, line 2. **praepostere**: putting that first which should be last.

22. **ad hoc**: 'for this purpose.'

23. **sua**: one of the regular constructions with **interest**; see the grammar, under **interest.**

24. **hoc facere**: that is, to stipulate for the benefit of a third party.

26. **ei cuius nihil interest**: namely, the stipulator. For the construction of **cuius**, refer again to the grammar, under **interest.**

28. **quantitas**: the amount to be forfeited as a penalty.

39. **creditori suo**: supply **dari stipulatus sit.**

PAGE 64, line 9. **Idem**: that is, his heir is liable to be sued.

DE FIDEIUSSORIBUS

16. **fideiussores**: 'sureties.' **Sponsores** and **fidepromissores** also were known to the earlier law, as accessories to a verbal contract.

17. **ut diligentius sibi cautum sit**: 'that a more effective guarantee may be given them.'

21. **naturalis**: a "natural" obligation was an agreement that could not be enforced by action, but was not in other respects destitute of legal effect. Hunter, p. 454.

23. **extraneus**: 'a third party,' not the master of the slave.

26. **praecedere obligationem**: that is, one might engage to become **fideiussor** in case a certain debt should be contracted. See Moyle's notes, p. 425.

28. **in solidum**: 'for the whole amount.'

30. **qui modo solvendo sint: solvendo** (understand **aere**) **esse** means to be able to pay.

31. **litis contestatae**: 'of the formulation of the question at issue.'

PAGE 65, line 3. **minus et plus**: that is, greater and less degrees of obligation.

8. The Greek means, "I order, say, desire, or wish, upon my faith."

CONTRACTS *LITTERIS*

16. **nominibus**: 'entries,' in a ledger.

21. **queri = exceptionem opponere.**

22. **cessante . . . . . obligatione**: 'in the absence, of course, of a ver-

bal obligation.'

24. **usque ad quinquennium procedebat**: 'was interpreted to be as long as five years,' that is, five years was fixed as the limit.

30. **nominibus transscripticiis**: 'transcriptive entries.' A **nomen arcarium** was a simple entry in writing—a memorandum—which had no legally binding force. A **nomen transscripticium,** constituting a so-called contract **litteris,** was a formal entry in a book of account. As to the actual form of this entry we know very little. It seems probable that "the creditor made an entry to the effect that an existing obligation had been cancelled by payment, i.e., he entered the sum due (on the **pagina accepti**) as received, and, at the same time, he made a second entry on the other side of the book—an **expensilatio**—debiting the other party with the amount in question, i.e., he entered that amount (on the **pagina expensi**) as *paid out* to the debtor." Sohm, p. 393. Whatever may have been the form of this **nomen transscripticium**, it constituted, when properly made, a valid contract **litteris.** The essence of the contractual obligation is the formal entry.

31. **a re in personam**: 'from thing to person.' The significance of the phrase seems doubtful. The effect of the entry is to transform the obligation **bona fide** already existing into an obligation **litteris**, depending upon the *form* of the entry, i.e., a **bona fide** obligation is transformed into a formal obligation.

36. **expensum: expensum alicui ferre** means to enter as paid to someone; that is, to charge him with the amount in question.

37. **delegaverit**: has substituted you for himself as my debtor; presupposing, of course, that you already owed Titius, or were willing for some other reason to assume his debt.

PAGE 66, line 1. **alia causa est**: 'the case is different.' **arcaria**: 'cash entries;' from **arca**, a money-box.

3. **numerata**: 'paid over;' lit., 'counted out.'

13. **quod Nervae placuit**: probably referring to the first part of the sentence, the meaning in that case being that Nerva held that these obligations were binding on foreigners. Compare **quod non placuit,** Dig. XLI, 1, 7, 11.

17. **chirographis et syngraphis**: the chirograph was originally an agreement written in the debtor's own handwriting; the syngraph was a written promise to pay, signed, or at least sealed, by both parties. See Buckland, p. 458, note 5.

24. **solemnia**: 'formal.' **creditum**: 'loan.'

31. **conventione et confessione**: 'agreement and acknowledgment.'

CONTRACTS *CONSENSU*

PAGE 67, line 6. **emptionibus venditionibus.** 'purchase and sale;' two sides of one transaction; commonly known as the contract of sale, or simply 'sale.'

7. **locationibus conductionibus**: 'letting and hiring,' the contract of hire, or simply 'hire.'

9. **praesentia**: the presence of the parties. **omnimodo**: 'even.' **ac ne = nec.**

13. **alter alteri obligatur**: 'each party is bound to the other,' that is, the contract is reciprocal or bilateral.

14. **ex bono et aequo**: 'in equity.'

Sale

20. **arra**: 'earnest money.'

29. **tabellionem**: 'a notary.'

30. **completiones acceperint**: 'have been filled out.' **partibus absoluta**: 'complete in detail.'

31. **paenitentiae locus**: 'a chance to back out.'

33. **ita**: 'on this condition;' explained by the clause beginning with **nisi**, below.

PAGE 68, line 1. **hoc subsecuto**: 'when this has been done,' that is, when earnest has been paid.

3. **adimplere**: 'to fulfil.'

4. **duplum**: 'twice' the earnest-money.

10. **constat**: 'results.'

14. **omnimodo**: 'exactly.'

17. **agente**: 'suing.'

19. **quasi**: 'on the ground that.'

21. **trahere**: 'to apply.'

22. **numerata pecunia**: 'money,' of definite denominations.

28. **speciem**: 'kind.'

31. **his verbis**: The quotation from Homer which follows is translated thus: 'Then the long-haired Greeks bought them wine, some with bronze, some with shining iron, some with skins, some with oxen whole, and some with slaves.' Iliad, VII, 472.

34. **non posse rem expediri**: 'the question can not be answered.'

PAGE 69, line 3. **argumentatur**: 'supports his claim.'

5. **latius significatur**: 'is more fully stated.'

8. **initium**: this word is important, the meaning being that in barter the obligation *commences* with delivery.

10. **dumtaxat**: 'only.'

16. **periculum**: 'risk.'

20. **aliqua ex parte**: 'partially.'

30. **animadvertendum erit**: 'it will have to be determined.'

35. **utique tamen**: 'in any case, however.' **vindicationem rei et condictionem exhibere**: that is, to put the buyer in a position to sue for the thing, or for damages in case of its non-delivery. Although the contract of sale was complete with the fixing of the price, the seller was still the owner until the thing was delivered or the price paid or

satisfactory security for it given.

PAGE 70, line 2. **de furti et de damni iniuriae actione**: these obligations are described in the Institutes, Book IV, Titles 1 and 3.

9. **quod**: 'because.'

10. **ut consequatur . . . . non esse**: 'that he may recover as much as it would be to his interest not to have been deceived.'

Hire

16. **consistunt**: 'are founded on.'

18. **merces**: 'compensation.'

19. **competit locatori . . . . locati actio**: 'the lessor has an action on the lease.'

24. **fulloni . . . . sarcienda**: 'to a cleaner to be cleaned and pressed, or to a tailor to be mended.'

28. **praescriptis verbis**: In a Roman suit, the **demonstratio**, or preliminary statement, gave the technical name of the obligation alleged; if the subject of the suit did not fall under any of the regular categories, it was described in a similar brief statement called **praescripta verba.** Such obligations are sometimes called innominate contracts. Greenidge, p. 151; Moyle, p. 438, note.

32. **fruendam**: 'to be enjoyed,' that is, the fruits.

PAGE 71, line 6. **familiaritatem**: 'close connection.'

11. **pensio sive reditus**: 'the rent.'

12. **conductori**: the so-called dative of separation.

17. **emphyteuseos**: a Greek genitive of **emphyteusis.** The term is best left untranslated. See glossary.

19. **fulciendam**: 'to be supported.'

20. **naturalis**: 'as if it were in the nature of the contract.' Some editors read **natura talis.**

24. **particularis**: 'partial;' understand **interitus.**

36. **pluris, minoris**: genitives of value.

Page 72, line 4. **Titio**: read as dative of agent.

6. **verbi gratia**: 'say.'

13. **legem**: 'the terms.'

15. **praestare**: 'to be responsible for.'

Partnership

Note: After the analogy of sale and hire, the contract of partnership seems to be good as soon as the share of each partner is agreed upon. If the share has not been agreed upon, the law implies an equal division, and this implication perfects the contract.

26. **mancipiorum**: 'of slaves.'

28. **quidem**: this particle is often hard to translate; sometimes it expresses a slight emphasis or contrast, hardly sufficient to warrant verbal translation.

30. **spectantur**: 'are contemplated.'
34. **illa**: 'this,' the following.

PAGE 73, line 2. **rata**: 'valid.'
6. **opera**: 'personal service.'
13. **convenienter sibi existimavit**: 'consistently maintained.'
15. **allatum sit**: 'is incurred.' **compensatione facta**: 'a balance being struck.'
21. **renuntiaverit**: 'has repudiated.'
25. **lucrifaceret**: 'might reap the benefit of.'
26. **si quid . . . . lucrifaceret**: that is, after his withdrawal.

PAGE 74, line 2. **bonis suis cesserit**: 'has voluntarily surrendered his goods.' See Moyle, 390, n. **cessio bonorum.**
6. **eo nomine tantum . . . . si quid dolo commiserit**: 'only in case he has committed a fraudulent act.'
10. **non ad . . . . . dirigenda est**: 'ought not to be directed toward,' that is, as a standard.
17. **furti agere**: 'sue for theft.'
20. **capitis minutione**: see note on page 31, line 10.

Mandate

25. **sive aliena tantum**: 'or for the benefit of a third party only.'
27. **mandatum sit**: 'a mandate is given.'
30. **Mandantis**: 'of the mandator.'
32. **pro eo sponderes**: 'to go bondsman for him,' (by stipulation).
33. **qui in rem ipsius mutuaretur**: 'who borrowed it for the mandator's benefit.

PAGE 75, line 1. **agere cum eo ex fideiussoria causa**: 'to bring suit against him as a bondsman.'
2. **ut cum reo agas**: 'to bring suit against his principal.'
4. **in id quod**: 'for that sum which.'
5. **intervenit**: 'is made.'
14. **colloces**: 'invest.'
18. **ex consilio**: 'in consequence of advice.' **mandati**: understand **actione.**
30. **damno faciendo**: **damnum** refers to damage to property, **iniuria** primarily to personal violence.
32. **nomine**: 'on account of;' a **nomen** was a ledger account.
36. **pluris**: the genitive of price or value.

PAGE 76, line 7. **utique**: 'by implication.'
9. **dum adhuc integra res sit**: that is, before the agent has begun to carry out the mandate.
13. **utilitatis causa**: 'for reasons of convenience.'
15. **alioquin**: that is, if the bringing of such a suit were not allowed.
16. **probabilis**: 'allowable.' **et huic simile est, quod placuit**: 'there is a similar ruling to the effect that.'

19. **stricta iuris ratione**: 'according to the letter of the law.'

24. **ut integra causa**, etc.: so that the mandator may still attain his object without inconvenience.

35. **fulloni**: 'to a fuller,' or cleaner. **sarcinatori**: 'to a tailor.'

PAGE 77, line 3. **ergo**: 'now,' in a continuative sense: 'well then.'

8. **conveniendus**: **convenire** and **agere** both mean 'to sue.' **negotiorum gestorum**: supply **actione.**

9 and 10. **ideo** and **idcirco**: equivalent expressions, both meaning 'for this reason.'

14. **mutuo acceptam**: 'borrowed.'

15. **sorte et usuris**: 'principal and interest.'

INNOMINATE CONTRACTS

27. **definit**: 'draws the distinction.'

29. **actum**: the word **agere.**

PAGE 78, line 1. **ultro citroque**: 'reciprocal.'

2. **synallagma**: 'a mutual agreement.'

8. **initium**: see notes on page 69, lines 8 and 10.

17. **negotium**: 'transaction.'

21. **in factum . . . . iudicium**: a special action. See Sohm, 258-259, and 379-381.

25. **condicio temporis**: 'accidental circumstance.'

26. **an condici possit videndum**: 'it is a question whether the money can be recovered.'

27. **cum . . . . steterit**: 'when you have not been to blame.'

28. **repetitionem cessare**: 'the right of recovery fails.'

30. **Nam si . . . . habeat**: 'For example, if circumstances were such.'

32. **necesse habeas**: 'you find it necessary.' **sumptus**: 'expenditures.'

PAGE 79, line 2. **indemnitas tibi praestetur**: 'that compensation be made you.'

9. **veniet**: 'will result.'

10. **damneris**: 'you will be compelled to pay.' **quanti interest mea**: 'as much as it is to my interest.'

12. **quasi ob rem datum re non secuta**: 'as given for a thing without any thing being returned.'

This passage is to be compared with two others from the Corpus Juris: Dig. XII, 4, Title: **De Condictione Causa Data Causa Non Secuta**: 'The condiction for a cause given without any cause being returned;' and Dig. II, 14, 7, 2: **Sed et si in alium contractum res non transeat, subsit tamen causa, eleganter Aristo Celso respondit esse obligationem**: 'But even if the thing, **res**, (by its delivery) does not produce a contract of another type, nevertheless if it is the underlying reason, **causa**, (for the counter-performance) then as Aristo aptly replied to Celsus,

there is an obligation.'

A comparison of these three passages seems to indicate that **res** and **causa** are beginning to be used interchangeably. This may be due to confusion between **res** as a material cause and **causa** as a final cause. i.e., a purpose. We find this double use of the word cause in modern French in **chose**, 'thing,' and **cause**, 'cause;' the meanings here being completely differentiated though the etymological origin of the two words is the same. In Italian and in Spanish **cosa** has a similar double meaning.

13. **datum**: in agreement with **quod**, like **datum** in line 12.

21. **condici**: see note on page 24, line 2.

22. **praescriptis verbis**: see note on p. 70 l. 28, and Sohm, 258-259, and 379-381.

26. **dabitur**: supply **actio.** The **actio de dolo** was a praetorian remedy. Sohm, 209.

29. **tractatus**: 'methods of treatment.'

30. **exigas**: 'collect.'

32. **cessas**: 'fail' to do so.

PAGE 80, line 2. **insulis**: apartments or tenement houses, built around an open court, were called **insulae.**

4. **superioribus casibus**: see page 79, lines 6 and 17.

8. **De Condictione**, etc.: see note on p. 79, line 12.

10. **pretii explorandi gratia**: 'for appraisal.'

11. **in factum civilis actio**: see Sohm, p. 258, note, and 379.

14. **de aestimato**: this action applied to cases in which a person received the property of another for sale at a fixed price; the recipient assumed the risk of the care of the property, and was liable for the price agreed upon or else the return of the thing in good condition. Roby II, 180, and Buckland, 519 and 521.

20. **conveniret**: same construction as **ambigeretur.**

21. **praescriptis verbis**: see note on page 79, line 22.

26. **precario**: precarium has been described as "permissive possession until further notice;" it was revocable at any time at the will of the owner. Sohm, 335, and note. But see also Buckland, 521.

PACTS

32. **in suo nomine non stant**: 'are not classified simply as agreements.'

PAGE 81, line 1. **transeunt in proprium nomen contractus**: 'assume the form of a specific contract.'

4. **si . . . . non transeat**: 'if the thing does not produce a contract of another type.' **res**: compare note on page 79, line 12. **subsit tamen causa**: 'nevertheless if it is the underlying reason' (for the counter-performance).

7. **synallagma**: see note on page 78, line 2.

10. **evictus est**: 'claimed (successfully) by another.' **in factum actionem a praetore dandam**: 'an **actio in factum** would have to be given by the praetor' (to you). This action was given by the praetor to fit a new set of facts for which there was no action at civil law. See also note on page 78, line 21.

11. **Ille**: i.e., Mauricianus.

12. **praescriptis verbis**: this action was given when a state of facts existed which was but slightly different from that under which the civil law action was granted. It took the following form: **Demonstratio**: Because B has contracted to deliver Stichus to A, and X has seized Stichus before delivery; **intentio**: whatever X should do by way of satisfaction to A; **condemnatio**: condemn X to do. This is called an **actio praescriptis verbis** because the facts are stated in the **demonstratio** which precedes the **intentio**. Compare Sohm, 265.

15. **ob . . . . sit**: 'If a promise has been made to prevent the doing of a wrong.'

17. **hic**: 'in such a case.'

18: **nuda pactio**: 'a bare pact.' Such an agreement "does not give rise to an obligation," says the text, i.e., it can not be made the basis of an action, but "it does give rise to an exception," which may be used as a defense, if the thing given in pursuance of the promise should be demanded back.

19. **sed parit exceptionem**: 'but it does give rise to an exception': If A delivers an ox to B, for which B promises to pay 100 **asses**, an obligation to pay is imposed on B by virtue of the contract. If B afterwards *informally* pays A, the obligation is not dissolved; hence A might sue B on the contract. But inasmuch as it would be inequitable for A to recover for a sum which B had already paid, an **exceptio de non petendo** was granted to B, which could be used as a defense. This rests on the tacit, informal pact not to sue, which could not be used as the basis of an action, and seems to be the first step taken by the courts to give value to an unenforceable pact. **Quin immo**: 'But as a matter of fact.'

20. **format**: 'shapes,' i.e., forms the basis of. **bonae fidei iudiciis**: *bona fide* judgments.' The contracts *bona fide* are sale, hire, partnership, and mandate. These contracts are unlike the earlier forms of Roman contracts which depend for their validity upon some concrete mark, as **verbis, litteris, re**. The *bona fide* contracts, on the other hand, are valid because a reasonable man observing the transaction from the outside would say that the parties *intended* to be bound by their agreement.

21. **pacta conventa**: 'agreements made as pacts;' **conventa** is the more general term, **pacta** the more technical. See Dig. II, 14, 1, 3.

22. **ex continente**: 'immediately.'

23. **etiam ex parte actoris**: 'for the benefit of the plaintiff also.'

The plaintiff may use it as the basis of an action; it is not simply to be used by the defendant as the basis of an exception.

26. **tempore statuto dilationis**: 'statutory period of delay.' Movables constituting a part of the dowry must be returned within a year. Code V, 13, 1, 7a. See Buckland, 110.

28. **in tutelae actione**: 'in an action on a guardianship,' and so later than the appointment of the guardian.

30. **ea enim pacta insunt**: 'for those pacts are effective.' **legem**: 'terms.'

33. **naturam**: 'scope.' **ob hanc causam**: 'on the basis of this cause.' This added agreement was not a part of the contract of sale.

36. **ex parte rei**: 'on the side of the defendant.'

PAGE 82, line 2. **parere exceptiones**: 'give rise to exceptions.' A pact unenforceable by the plaintiff in an action may be used by the defendant as an exception. See note on page 81, line 19.

3. **pactiones**: 'pacts.' The better manuscripts read **exceptiones**, but **pactiones** seems to fit the context better, and **exceptiones** may have been taken by the scribe from the line above.

9. **ad actionem proficiat**: 'constitute a good ground for an action.' **nondum re secuta**: 'if the transaction is not yet concluded.'

12. **quod . . . . potest**: 'a keen observation.'

15. **quasi repetita partis emptione**: 'on the ground that the sale of a part is made again,' implying the cancellation of the first sale.

24. **fraus**: 'evasion.'

Pacta Adiecta

28. **exceperit**: 'has reserved.' **inquilino**: 'lessee' (of a dwelling).

29. **colono**: 'tenant' (of a farm). **magis esse Servius putabat**: 'Servius was rather of the opinion.'

30. **ex vendito esse actionem**: 'that the action is on the sale contract.' The reservation was a **pactum adiectum**. But this pact, added to the contract of sale, was enforced by an action on the sale contract, not by one upon the pact.

32. **cum colono experiatur**: 'may sue the tenant.'

33. **quidquid fuerit consecutus**: 'whatever he has acquired' (wrongfully).

PAGE 83, line 2. **si vendat, non alii, sed sibi distrahat**: 'that if he (the purchaser) should sell it, he should dispose of it to none other than to himself (the original seller).'

7. **respondit**: as subject, understand the jurist. **nullam esse venditionem**: this transaction is not a sale, because no price in money is agreed upon. Sohm, 396. **civili intentione incerti agendum est**: 'suit must be brought by an action for a thing of uncertain value.' The action will have the following form: **demonstratio**; quod Ausonius insulam non refecerit, **intentio**; quidquid Numerius dare facere oportet,

conclusio; condemna . . . . .

10. **certa pecunia:** the price makes of this transaction a sale. **ut . . . . reficeres:** this clause is a **pactum adiectum,** enforceable by an **actio ex vendito.**

11. **si autem hoc solum . . . . convenisset:** this transaction lacks a definite price, hence there is no sale. The plaintiff here would have the "**actio ex stipulatu,** in which the **stipulatio** was named (in the **demonstratio** of the formula) as the ground on which the action was brought (quod Ausonius de Numerio incertum stipulatus est, quidquid ob eam rem Numerius Ausonio dare facere oportet, condemna)." Sohm, 388, note 6.

Pacta Praetoria

18. **Debitum**: 'a sum owed.' **constitui**: 'be made a **constitutum debiti.** A **constitutum debiti** is a promise to pay a subsisting liability at a fixed time. Such a pact was made actionable by the praetor. Buckland 526. Sohm 416.

19. **sive certi sive incerti**: 'whether a definite or indefinite sum.'

22. **natura**: 'for a natural reason.'

25. **arca**: 'cashbox.' **salva ratione usurarum**: plus the interest.

26. **Respondit**: as in line 7, above.

31. **pignori**: 'security.' The movables carried by a tenant into the building of his landlord become security for the payment of the rent. The obligation here is created by the tacit agreement—a pact—implied in this state of facts.

PAGE 84, line 1. **fructus qui ibi nascuntur**: young animals born on rustic estates. This too is based on a tacit agreement between landlord and tenant.

Pacta Legitima

6. **Legitima conventio**: such a pact becomes enforceable simply by virtue of the legislative act.

10. **nullo iure cogente**: 'without any legal compulsion.'

17. **habitare gratis** etc: 'the free occupation of another's house is considered a gift; for he who occupies seems to receive just this: that he does not pay a price for the dwelling. For a gift can exist even without the giving of a corporeal thing, as for example if by way of gift I promise my debtor that I will not collect from him before a certain time.'

23. **Pollicitatio donationis,** etc: this fragment was probably of the time of Constantine, 306-337 A. D.

26. **Ceteris . . . . valituris**: ablative absolute. 'Furthermore, other donations' (except some types previously mentioned) 'which are not entered in the existing public records, are without any exception valid up to 500 **solidi.**'

PAGE 85, line 1. **Resque donatas . . . . reddere compelli**: this sentence depends upon **sanximus** understood.

2. **eos**: i.e., the donors.

4. **heredibus**: the pact to give a gift binds both the donors and their heirs to deliver to the donees and their heirs.

6. **quam . . . . placuit**: 'which has once been offered.' This enactment legalized an informal promise to give a dower.

12. **deputata sit**: 'has been devoted.' **monumentorum observatione . . . . . observanda**: 'the form of record in these instances to correspond to what has been specifically mentioned above by us in cases of this sort.'

15. **ex quibusdam machinationibus**: 'because of certain intrigues' (on his part). **indevotus**: 'unconscientious.'

17. **caelestes**: supply **poenas**; 'the vengeance of heaven.'

NATURAL OBLIGATIONS

20. **pro dote**: 'by way of dower.' **obligatam**: 'legally bound.' The Roman **dos** is a gift from the father of the bride to the husband, for the support of the marriage relation.

21. **sublata . . . . opinione**: 'for even though her false impression is corrected.'

22. **pietatis causa**: 'motive of conjugal duty;' a natural obligation. **ex qua solutum**: 'what is paid because of this.'

25. **exceptionem perpetuam**: 'peremptory exception.' Such an exception "absolutely debars the plaintiff from bringing an action." See Sohm 281. **solutum per errorem**: '(money) paid by mistake.'

26. **perpetuum**: 'universally true.'

27. **eius causa . . . . cum quo agitur**: 'for the benefit of the defendant.'

28. **in senatus consulto (Velleiano)**: 'under the **senatus consultum** (Velleianum).' See Sohm 277. **de intercessionibus**: 'concerning sureties.'

29. **in odium eius cui debetur**: 'to the hardship of a creditor.'

30. **Macedonianum**: supply **senatus consultum**. Cf. Sohm 375.

PAGE 86, line 3. **In quo et illud continetur**: 'Whence it follows.'

4. **eo compensato**: 'after a balance has been struck.'

5. **is cum quo actum est**: 'the defendant.'

6. **in strictis iudiciis**: 'in **stricti iuris** cases.' In such cases the parties are bound to the exact performance of that which they promised. Sohm 367.

8. **iure aperto**: 'on a clear right.'

9. **ipso iure**: 'of right.'

25. **substantiam capiunt**: 'arise;' practically synonymous with **nascuntur.**

27. **ultro citroque**: 'each against the other.'

28. **negotiorum gestorum**: supply **actiones.**

32. **quippe**: 'inasmuch as.'

PAGE 87, line 1. **utilitatis causa**: 'for the general advantage.'

2. **nulli demandata**: 'without having entrusted to anyone.'

14. **nullum enim . . . . contrahitur**: 'for no contract is entered into between tutor and pupil.'

20. **in rem pupilli**: 'on the property of the pupil.'

24. **communi dividundo iudicio**: 'in a suit for division.'

30. **familiae erciscundae**: 'for division of the inheritance.'

37. **non debitum**: 'a sum that was not owed.'

PAGE 88, line 2. **certiorem rationem**: 'a more accurate statement.'

3. **ex distractu**: 'by the discharge of a contract.'

9. **repeti non potest**: 'recovery can not be enforced.'

11. **infitiando lis crescit**: in certain cases a defendant who denied his obligation was compelled to pay double as a penalty for his denial. See Gaius IV, 9 and 171.

12. **lege Aquilia**: a famous law concerning damage to property. See Inst., Bk. IV, Tit. 3.

13. **quidem**: correlative with **autem,** line 15. These two words are often used to mark a contrast.

14. **certa constituta per damnationem**: 'which having been specifically set aside by condemnation.'

16. **indulsit**: 'allowed.'

21. **intuitu**: 'in consideration of.'

33. **cum absente**: construe with **contraxisse.**

35. **longe magis**: this sentence requires a negative. Read "much less," or supply **non** after **intellegi.**

PAGE 89, line 13. **personales invicem praestationes**: 'reciprocal personal performances.'

15. **cessat**: 'does not apply.'

21. **pariter**: 'jointly.'

22. **testamento legata est**: 'has been devised by will.'

23. **duplicibus**: 'reciprocal.'

24. **finium regundorum**: 'adjustment of boundaries.'

25. **par . . . . videtur**: 'the right of all seems to be the same.'

30. **ei condici potest**: 'he can be sued by a condiction' (in the following terms).

PAGE 90, line 2. **distrahere**: see note on **distractu,** p. 88, line 3.

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GLOSSARY

This list contains Latin law terms and other words not usually found in the smaller Latin dictionaries, together with page and line references to typical uses in the text.

actio, 18, 10, an action at law; a lawsuit; sometimes permission for a suit.

actus, 29, 14, the right to drive through another's land.

adimplere, 68, 3, to fulfill.

adrogatio, 46, 7, a form of adoption, i.e., of a **homo sui iuris** in place of a child.

adrogo, 41, 27, to adopt a **paterfamilias.**

aestimatus, 80, 14, appraised.

ago, 26, 27, to sue.

alluvio, 22, 16, imperceptible accretion to land, due to sediment deposited by a stream.

ambiguitas, 23, 21, controversy.

Antoninus, 34, 23; 43, 13, Marcus Aurelius Antoninus Caracalla, emperor of Rome, 211-217 A. D.

aquae ductus, 29, 15, the right to conduct water across another's land.

arcarius, 66, 1 and 7, of the cashbox; **arcaria nomina,** cash accounts.

Aristo, 53, 24; 81, 5, a jurist of the first century A. D.

arra, 67, 20, earnest-money.

Atinia, 33, 17, of Atinius. Atinius is the name of a Roman gens.

augmentum, 88, 17, an increase.

Augusta, 35, 13, the empress.

bona, 47, 11, privileges.

Caesar, 27, 15, the emperor.

Caesariensis, 38, 28; 62, 26, of Caesarea.

Capua, 78, 24, a city in Campania.

caput, 31, 4, civil status.

Carthago, 79, 30, Carthage, a city in Africa.

Cassius, 66, 13, a jurist of the time of Claudius.

cautio, 31, 7, a form of security.

caveo, 55, 10; 64, 18, to give security.

cedo, 26, 9, to pass; accede; accrue.

Celsus, 81, 5, a jurist of Hadrian's time.

chirographum, 66, 17, an obligation evidenced by one's own writing.

coaduno, 43, 35, to join together.

codex, 44, 8 and 18, a code; a manuscript; a document.

colonus, 26, 35, a tenant.

commodatum, 54, 3; 55, 4 and 17, a loan for use.

competo, 26, 20, to be suitable or available.

completio, 67, 30, filling out; completion.

condicionalis, 58, 1, conditional.

condicticius, 52, 33, of **condictio.**
condictio, 24, 2; 52, 30, a personal action for the recovery of a definite sum of money.
(ius) condo, 17, 26, make; treat of; interpret (law).
conflo, 23, 25; 24, 9, to melt together; to fuse.
consonans, 57, 16, agreeing.
consonantia, 42, 22, a harmonious whole.
constitutio, 18, 19; 40, 1, an institution; a law made by the emperor.
contestatio, 44, 21, a certified copy.
contractus, 16, 24; 68, 13; 80, 20, a contract.
conventionalis, 60, 11, made by agreement.
defunctus, 33, 30; 87, 33, deceased.
depositum, 16, 25, a deposit; a thing entrusted to one for safe-keeping.
deputo, 85, 12, to destine; to allot.
digesta, (plu.) 69, 5, writings arranged under certain heads; a digest.
dispositio, 36, 9, an arrangement.
distractus, 88, 3, the dissolution of a contract.
dolus malus, 25, 14, fraud.
ecclesia, 88, 20, a church.
emancipatio, 40, 3, the releasing of a son from **patria potestas;** emancipation.
emphyteuticarius, 71, 23, a holder of a perpetual lease of land.
emplastrum, 23, 17, a plaster (in medicine).
emptio venditio, 16, 24, purchase and sale, or simply sale.
ercisco, 87, 30, to divide an inheritance.
exceptio, 25, 14; 38, 37; 39, 2; 65, 19, an exception; a plea offered in defense.
(ad) exhibendum, 25, 4, for production in court.
expensum ferre, 65, 34, to enter as paid out; to charge.
expromissor, 27, 32, one who promises to pay (either for one's self or for another).
fenero (faenero), 75, 15, to lend on interest.
festuca, 50, 26 and 29, a ceremonial rod.
fideicommissarius, 44, 10, one who is benefited by a bequest in trust.
fideiubeo, 57, 8, to go surety for someone.
fideiussoria, 75, 2, relating to surety.
fidepromitto, 57, 7, to be surety.
fructuarius, 27, 1, one who has a usufruct.
fullo, 70, 24, a cleaner; a fuller.
Hadrianus, 27, 10; 64, 36, Hadrian, emperor of Rome 117-138 A. D.
Homerus, 35, 33, Homer, the great Greek epic poet.
honorarius, 52, 9, honorary, i.e., made by an official.
honorifico, 88, 21, to treat with honor.
hypotheca, 35, 9; 37, 34, a form of pledge, in which the right to take possession, but not possession itself, passes to the pledgee.

indemnis, 37, 22, without loss.
indemnitas, 79, 2, security from loss.
innovo, 67, 25, to alter.
insinuo, 36, 9, to introduce; insert; put in.
insula, 55, 12, a tenement-house.
insuptiliter, 82, 12, without subtlety.
intendo, 35, 8, to sue.
interpretatio, 58, 35, translation.
interrogatum, 57, 12, a question.
intuitus, 88, 21, view; consideration; feeling.
iter, 29, 14 and 15, the right of passage through another's land.
Iulianus, 27, 6; 53, 17; 81, 8, Salvius Julianus, a jurist of the time of Hadrian.
Iulius, 37, 30, of Julius.
Iustinus, 36, 31, the father of Justinian.
Labeo, 77, 28, a jurist of the time of Augustus.
legatarius, 30, 17; 44, 10, a legatee.
lego, 30, 16 and 18, to bequeath; to leave by will.
Leo, 63, 3, an emperor of the Eastern Roman Empire, 457-474 A. D.
Leonianus, 57, 15, of the emperor Leo.
libripens, 42, 10, a balance-holder.
locatio conductio, 16, 25, letting and hiring, or simply hire.
Macedonianus, 85, 30, the senatus consultum Macedonianum, of the time of Vespasian, dealt with loans made to **filiifamilias.**
Maevius, 59, 16, a conventional name, like John Doe.
Marcus, 35, 1; 86, 6, the emperor Marcus Aurelius, 161-180 A. D.
Mauricianus, 81, 8, a jurist.
minutio, 74, 21, a lessening; a lowering.
missilia, 28, 15, presents thrown to the people.
mutuum, 16, 25, a loan for consumption.
Neratius, 83, 13, a jurist of the time of Trajan.
Nerva, 66, 13, the name of two jurists, father and son, of the times of Augustus and Nero respectively. The elder was the grandfather of the emperor Nero.
nomen, 65, 16, an account.
numeratus, 30, 31; 66, 3, coined; paid over.
numeratio, 77, 31, payment (of money).
obligatorius, 75, 17, obligatory.
opinio, 17, 25, opinion.
Paconius, 54, 29, a jurist.
Pamphilus, 64, 3, a slave name.
Papinianus, 81, 32, an eminent jurist of the time of Septimius Severus.
patrimonium, 19, 3, property, originally that inherited from one's father.
peculium, 39, 18, property allowed to a son, daughter, or slave, to deal

with as one's own.

pendens, 60, 40, **in pendenti,** in suspense.

percipio, 26, 32; 87, 25, to reap.

permutatio, 69, 8, barter.

peto, 26, 4, to sue.

pigneraticius, 56, 19, of pledge.

Piraeus, 35, 34, a Greek personal name.

Pius, 34, 22, Antonius Pius, emperor of Rome, 138-161 A. D.

Plautius, 33, 18, of Plautius (Marcus Plautius Sylvanus), a tribune of the plebeians of the first century B. C.

Pomponius, 43, 5; 82, 7, a jurist of the second century A. D., and a voluminous writer.

positio, 15, 16, an aspect; a branch.

praescriptio, 41, 19, limitation as to time; prescription.

praestatio, 89, 13, performance.

principalis, 65, 24, of the **princeps,** or emperor.

Proculus, 53, 7 and 9; 68, 37, a jurist of the first century A. D.

proprietas, 19, 21, ownership.

quaestor, 38, 29, a treasurer; custodian, chamberlain.

Quintus Mucius, 73, 2, Scaevola the Younger, eminent jurist and writer of the first century B. C.

repetitio, 78, 28, the right to seek restitution.

reprobo, 82, 13, to disapprove.

repromissio, 58, 10, a counter-promise.

res religiosae, 19, 32, things dedicated to the gods of the lower world, e.g., burial grounds.

res sacrae, 19, 32, things consecrated to the worship of the gods above.

res sanctae, 19, 32, inviolable things, e.g., the walls and gates of a city.

Sabinus, 66, 13, the first jurist to exercise the **ius respondendi,** which was conferred upon him by Augustus.

sarcinator, 70, 23, a tailor; a mender.

sculptura, 43, 4, a carving; a device.

Seius, 59, 16, a conventional name, like John Doe.

sententia, 17, 25, a judgment.

servitus, 18, 19, a servitude; a right in another's property, **ius in re aliena.**

Servius, 73, 4; 82, 30, Servius Sulpicius, a jurist of the first century B. C.

signaculum, 42, 31, a seal; a signet ring.

societas, 16, 25, partnership.

solidum, 59, 19, whole.

solidus, 36, 10, (supply nummus) a gold coin of the imperial period.

sollemnitas, 44, 35, formality.

solvo, 26, 5, to pay.

specialiter, 72, 25, specifically.

species, 23, 11 and 22; 24, 10; 39, 33, an article (of manufacture); kind; variety.
Stichus, 60, 32, a slave name.
stipendiarius, 27, 25, stipendiary.
stipulatus, 57, 3; 61, 3, a promise formally demanded; a stipulation.
stipulus, 57, 4, firm (old Latin).
synallagma, 78, 2, a mutual agreement.
syngrapha, 66, 18, a written agreement, executed by both parties.
tabellio, 67, 29, a notary.
Telemachus, 35, 34, a son of Ulysses.
Titius, 61, 6, a conventional name, like John Doe.
Traianus, 45, 11, Trajan, Roman emperor 98-117 A. D.
transscripticius, 65, 30, transcriptive.
transscripticius, 65, 32, transcriptive.
Tribonianus, 38, 28, a praetorian prefect under Justinian.
tributaria, 27, 24, tributary.
Tubero, 82, 31, a jurist of the first century B. C.
universitas, 19, 29; 41, 24; a corporation; **per universitatem,** as an aggregate (of rights and duties).
(in) universum, 30, 23, altogether.
usucapio, 33, 12; 40, 22, a taking by use.
usufructuarius, 40, 29, one who has a usufruct.
usus fructus, 27, 5, use and enjoyment.
utor fruor, 30, 12, to use and enjoy.
utilis actio, 26, 16, an existing action extended to an analogous case.
Verrius, 49, 22, Verrius Flaccus, a Latin lexicographer of the time of Augustus.
verto, 59, 21, to involve.
via, 29, 14, the right of roadway through another's land.
vindicatio, 69, 35, a suit to enforce ownership.
vindicta, 37, 11, a ceremonial rod or staff.
Vivianus, 54, 34, a jurist of the first century A. D.
Zenonianus, 35, 14; 71, 16, of the emperor Zeno, of the Eastern Roman Empire, 474-491 A. D.

INDEX

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